California Gas Transport, Inc. *and* General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of The International Brotherhood of Teamsters.[1] Cases 28–CA–19645, 28–CA–19666, 28–CA–20014, 28–CA–20082, 28–CA–20177, and 28–RC–6316

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 16, 2005, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions except as specifically set forth below and to adopt the recommended Order as modified.[3]

This case involves severe and pervasive unfair labor practices committed by the Respondent affecting its employees in El Paso, Texas, and Nogales, Arizona.

We agree with the judge that the Respondent violated Section 8(a)(1) when Operations Manager Oscar Gardea threatened employees with unspecified reprisals; Accounting Manager Joel Meraz solicited employees to resign and threatened them with discharge; and Jesus Acosta threatened employees with discharge. We agree with the judge that it is appropriate to assert jurisdiction over these violations, which occurred in Mexico. Contrary to the judge, however, we find that Juan Espinoza is not an agent of the Respondent and consequently we dismiss the 8(a)(1) violation attributed to him. Further, we agree with the judge that the Respondent violated Section 8(a)(1) when Dispatcher Gabriel Velasco interrogated and threatened employees and created the impression of surveillance, and when Accounting Manager Meraz promised employees a wage increase if they voted against the Union and threatened employees with a loss of a wage increase if the Union was successful.

We agree with the judge that the Respondent independently violated Section 8(a)(3) and (1) and Section 8(a)(1) by discharging nine employees at its El Paso facility who had engaged in a protected work stoppage and had informed the Respondent that they were going to seek union representation.

We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging two employees at its Nogales facility who had engaged in union and other protected concerted activity[4] and subsequently violated Section 8(a)(1) by giving negative employment references about these two employees.

Finally, we agree with the judge's conclusion that a remedial bargaining order for the Nogales-based drivers unit is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and we adopt the judge's related findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by making unilateral changes and engaging in direct dealing.

I. FACTUAL BACKGROUND

The facts are set forth in the judge's comprehensive decision. The Respondent, headquartered in El Paso, Texas, and with operations in Nogales, Arizona, and San Diego, California, transports propane gas on trucks from points in California, New Mexico, Arizona, and Texas to distribution facilities in Mexico.[5] The Respondent has only one customer, Universal Gas & Oil, LTD (Universal). The Respondent transports propane purchased by Universal to distribution facilities operated by Transportadora Silza (Silza). The Respondent and Silza are parties to a contract under which the Respondent has essentially designated Silza to act on its behalf when the Respondent is operating its business in Mexico.

For several years, the Respondent's drivers had complained to the Respondent about wages and working conditions. In August 2004,[6] after the Respondent made a decision to terminate the drivers' established and widespread practice of selling excess diesel fuel in their trucks for personal gain, the drivers in Nogales and El Paso

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

[4] We also agree with the judge that the Respondent engaged in objectionable conduct when it discharged these two employees.

[5] The San Diego facility is not at issue in this case.

[6] All dates are 2004.

decided to take contemporaneous, but different courses of action to address their concerns.

At the Nogales facility, sometime in August, drivers Robert Ryburn and Rogelio Delgadillo met with other Nogales drivers to discuss their unresolved complaints concerning wages and working conditions. Some of their colleagues had been in contact with the drivers in El Paso, and they were informed that the El Paso drivers might engage in a work stoppage. The Nogales drivers, responding to a request by the El Paso drivers, agreed that they would not drive the El Paso drivers' routes if the drivers engaged in a work stoppage. At the same meeting, the Nogales drivers decided to contact the Union to see if union representation could help them with their unresolved complaints.

The Nogales drivers subsequently met with union organizer Kathy Campbell. There were 19 drivers in the Nogales unit and, by August 30, the Union had obtained signed authorization cards from 16 of them. On September 13, the Union filed a petition in Case 28–RC–6316 seeking to represent the Nogales-based drivers. The Respondent received a copy of the Union's petition that same day.

Around this same time, the El Paso-based drivers presented the Respondent with a written petition outlining their concerns, including the demand for a raise. A week later, on September 11, after the Respondent failed to respond to the drivers' requests, nine of the drivers refused to work. On September 14, the Respondent terminated the drivers who engaged in the work stoppage. Sometime after the Respondent terminated the El Paso strikers, the Respondent assigned the Nogales drivers to drive the El Paso drivers' routes. The Nogales drivers refused to drive the El Paso routes.

On September 24, the Respondent terminated Ryburn and Delgadillo, the leaders of the union organizing campaign in Nogales. The stated reason for their termination was that the Respondent had discovered that each man had incited the Nogales-based drivers to refuse the El Paso routes and that it had received several complaints from other drivers that Ryburn and Delgadillo had threatened them with physical harm if they drove the El Paso routes.

After Ryburn and Delgadillo were terminated, they sought employment with one of the Respondent's competitors. The competitor had an arrangement with the Respondent whereby its drivers picked up their customs documents at the Respondent's Nogales office. When the competitor inquired about Ryburn and Delgadillo coming to work for it, the Respondent's operations manager, Oscar Gardea, stated that he did not want them at the Respondent's Nogales office. As a result, Ryburn and Delgadillo were not hired by this employer.

On October 18, a representation election was held in the Nogales unit pursuant to a Stipulated Election Agreement. Of the votes cast, 4 were for the Union, 8 were cast against the Union, and 3 ballots were challenged. The challenged ballots were not sufficient in number to affect the results of the election.

II. VIOLATIONS

A. The 8(a)(1) Violations

1.

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) when Operations Manager Gardea threatened employees with unspecified reprisals; Accounting Manager Meraz solicited employees to resign and threatened them with discharge; and Business Agent Jesus Acosta threatened employees with discharge.[7]

In finding that the Respondent violated the Act, the judge, sua sponte, raised the issue of "extraterritorial" jurisdiction as the conduct alleged to violate Section 8(a)(1) occurred in Mexico. The judge concluded that the Board should exercise jurisdiction over the unfair labor practices committed in Mexico.[8] In its exceptions, the Respondent contends that the Board does not have jurisdiction over the conduct that occurred in Mexico. We disagree.

Relying on our decision in *Asplundh Tree Expert Co.*, 336 NLRB 1106 (2001), enf. denied 365 F.3d 168 (3d Cir. 2004), we agree with the judge that we can and

[7] We agree with the judge, for the reasons stated in his decision, that Acosta is an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

[8] In doing so, the judge highlighted the fact that the Respondent is a United States-based company, and its employee drivers are employed primarily in the United States. Their duties require visits to Mexico when drivers unload propane at the Silza facilities and, in some instances, receive purchase orders for diesel fuel, route assignments, and pick up their trucks. The majority of the drivers' worktime, however, is spent in the United States driving to and from United States-based refineries.

The El Paso drivers transport propane gas from refineries in Artesia, New Mexico, and three refineries in Texas—Ozona, Sundown, and El Paso—to the Silza facility in Juarez, Mexico. The drivers begin their trips in Juarez. The drivers then drive across the border to purchase diesel fuel in El Paso and head to the assigned refinery to pick up propane. After loading the propane, drivers return to the Silza facility in Juarez, where Silza employees unload the propane.

The Nogales drivers transport propane gas from refineries in Gallup, New Mexico, Phoenix, Arizona, and El Paso to the Silza facility in Nogales, Mexico. The drivers begin their trips at the Respondent's facility in Nogales, Arizona. They drive to the Nogales truckstop to purchase diesel fuel and then head to the assigned refinery to pick up propane. After unloading propane at the Silza facility in Nogales, Mexico, they return to Respondent's facility in Nogales, Arizona.

should assert jurisdiction over the unfair labor practices committed in Mexico under the circumstances here. In *Asplundh*, the Board held that the employer, an American company, had violated the Act by threatening an employee with discharge and by discharging two employees because the employees, who were United States nationals on temporary assignment in Canada, had engaged in protected concerted activities while in Canada. The Board asserted jurisdiction because "the main effect of the Respondent's actions . . . was not extraterritorial[,] the Board's assertion of jurisdiction would not interfere with Canadian law[, and] a remedial order would have no demonstrable extraterritorial effect." *Asplundh*, 336 NLRB at 1107.

The Board's decision in *Asplundh* is consistent with the Supreme Court's post-*EEOC v. Arabian American Oil Co. (Aramco)*[9] decisions. In *Aramco*, the Supreme Court determined that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially. In so holding, *Aramco* applied a strict presumption against extraterritoriality. However, *Aramco* was followed by cases which applied an "effects" test.[10] Under the "effects" test, it is presumed that Congress does not intend to regulate extraterritorial conduct, but "extraterritorial conduct" is defined as conduct that both occurs outside of the U.S. and causes no effects within the U.S. In other words, conduct with effects in the U.S. is not necessarily deemed extraterritorial. In *Asplundh*, supra, the Board asserted jurisdiction over *Asplundh* because "the main effect of the Respondent's actions (the loss by [the employees] of their jobs in the United States) was not extraterritorial" and the "results of [Asplundh's] conduct were principally felt in the United States." *Asplundh*, 336 NLRB at 1107.[11] See *Dowd v. International Longshoremen's Assn.*, 975 F.2d 779 (11th Cir. 1992) (interpreting *Aramco* narrowly, as invoking the presumption against extraterritoriality only when there is a conflict of U.S. law and foreign law and concluding that the Act applied to union officials committing an unfair labor practice while temporarily abroad).

Here, the conduct of the Respondent's supervisors and agents, in the form of the 8(a)(1) violations, caused unlawful effects in the United States. The violations certainly interfered with and restrained the employees' ability to freely exercise their Section 7 rights in the United States. "[F]ailure to assert jurisdiction would undermine the Act's policy of protecting the right of employees to engage in concerted activity designed to affect their terms and conditions of employment." *Asplundh*, 336 NLRB at 1107. We agree with the judge that the Respondent should not be permitted to escape responsibility for its actions directed at its American work force simply because they occurred a short distance beyond an international border.[12]

Additionally, asserting jurisdiction over the extraterritorial violations would not "create[] a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. at 165.

With regard to the unlawful conduct engaged in by Gardea and Meraz, the law of Mexico and the employment conditions of Mexican employees are not implicated. Both of those individuals are supervisors of the

[9] 499 U.S. 244 (1991).

[10] Two years after *Aramco*, the Court endorsed the use of the "effects" test to evaluate the jurisdictional reach of the Sherman Act. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). In 2004, the Court again referred to the "effects" test, in interpreting the Foreign Trade Antitrust Improvements Act. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). In 2005, the Court, in a plurality opinion, endorsed an "effects" test for foreign-flag ships in U.S. waters. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (plurality opinion). See also *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) ("the presumption [against extraterritorial application] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States"). See generally Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 Colum. L. Rev 2135 (2005).

[11] The Third Circuit denied enforcement of the Board's Order and ruled that the protections of the Act do not extend to American employees sent abroad temporarily by their American employers. *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168 (3d Cir. 2004). Relying primarily on *Aramco*, the Third Circuit took a broad view of what constitutes extraterritorial activity.

We respectfully disagree with the Third Circuit's analysis. The Third Circuit's opinion failed to address the Supreme Court's post-*Aramco* weakening of the strict presumption against extraterritoriality, discussed above.

Further, the Third Circuit did not address the Eleventh Circuit's conflicting decision in *Dowd v. International Longshoremen's Assn.*, 975 F.2d 779 (11th Cir. 1992).

[12] See also *December 12, Inc.*, 273 NLRB 1, 2–3 fn.11 (1984), enfd. mem. 772 F.2d 912 (9th Cir. 1985) (asserting jurisdiction over an American employee working for an American employer, fired for conduct that occurred while temporarily abroad); *Freeport Transport, Inc.*, 220 NLRB 833 (1975) (asserting jurisdiction over an American employee working out of an American trucking company's Canadian terminal who was discharged for participating in an American organizational campaign, which for a time included a plan to organize Canadians). Cf. *Range Systems Engineering Support*, 326 NLRB 1047, 1048 (1998) (upholding determination that Board lacks jurisdiction over U.S. citizens permanently working at American company's foreign facility); *Computer Sciences Raytheon*, 318 NLRB. 966, 970–971 (1995) (concluding Board lacks jurisdiction over employees of American companies working at military bases in foreign territories); *GTE Automatic Electric Inc.*, 226 NLRB 1222, 1223 (1976) ("[A]ll installers permanently assigned to Iran ... are not within the jurisdiction of the [National Labor Relations] Act."); *RCA OMS, Inc.*, 202 NLRB 228, 228 (1973) (concluding that Board lacks jurisdiction over Greenland-based employees).

Respondent who are stationed in the United States. The Board's remedial order with respect to those violations would have no demonstrable extraterritorial effect.

As for Acosta, who is apparently a Mexican national, none of the unlawful conduct he engaged in involved his relationship with his Mexican employer (Silza) or with Mexican employees. Accordingly, the laws of Mexico and the employment conditions of Mexican employees are not implicated in those findings. What is implicated is the Respondent's relationship with its own employees. The Board's remedial order with respect to the Acosta violations will, in turn, also directly affect only the Respondent and its employees.

2.

The judge found that the Respondent violated the Act when Juan Espinoza promised employees a raise if they voted against the Union. In doing so, the judge concluded that Espinoza had apparent authority to act on behalf of the Respondent, and was therefore its agent within the meaning of Section 2(13) of the Act. In its exceptions, the Respondent contends that Espinoza is not its agent, and therefore that it cannot be held liable for his alleged unlawful statement. We agree with the Respondent.[13]

The Board applies common law principles of agency in determining whether persons are acting with apparent authority on behalf of the employer. Apparent authority will result from a manifestation by the employer to a third party that creates a reasonable basis for the employee to believe that the employer authorized the action of the alleged agent. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), and cases cited therein. The test for determining whether a person is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question. See, e.g., *Waterbed World*, 286 NLRB 425, 426–427 (1987). Statements by the putative agent, however, do not constitute evidence of agency status. *MPG Transport, Ltd.*, 315 NLRB 489, 493 (1994), enfd. mem. 91 F.3d 144 (6th Cir. 1996); *Virginia Mfg. Co.*, 310 NLRB 1261, 1266 (1993), enfd. mem. 27 F.3d 565 (4th Cir. 1994). See Restatement 2d, *Agency*, § 284, Comment d.

[13] We need not pass on Palemon Solorzano's alleged agency status. The judge dismissed the 8(a)(1) allegation involving Solorzano, and no party has excepted.

Espinoza is employed in some capacity by Silza at its facility in Nogales, Mexico. No one seems to know exactly what he does and the judge referred to him as a "mysterious character." The drivers who testified at the hearing asserted that Espinoza was in some way connected with the Respondent. Employee Ryburn testified that one of his supervisors was "Mr. Espinoza on the Mexican side." Further, he said Espinoza was "Mr. Gardea's counterpart, operations management on the Mexican side."

In January, Ryburn spoke to Espinoza about a possible promotion. Earlier, Ryburn had given the Respondent notice of his intent to resign. Ryburn testified that when he mentioned this to Espinoza, Espinoza asked him if he would be interested in a management position with the Respondent. Ryburn indicated some interest, and Espinoza told him he would raise the matter with the "higher ups." Several weeks later, Espinoza told Ryburn that he (Espinoza) had spoken with "his bosses" and an interview could be arranged. However, when Espinoza made it clear that the promotion would require that Ryburn relocate to El Paso, Ryburn indicated that he did not want to move.

Nogales-based driver Joe Bojorquez testified about certain conversations that he had prior to the representation election. According to Bojorquez, about 2 weeks prior to the election, "Mr. Espinoza . . . one of the supervisors from down in Mexico," told the drivers, "Just forget about the Union, that we were going to get like a $30 raise, or something like that. And, he was taking care of all of that." This account was corroborated by driver Junior Sene. Sene testified that he was introduced to Espinoza by "Jose," the dispatcher in Mexico, as "the second man in charge of the company . . . one of the head men."

Contrary to the judge, we find that the evidence is insufficient to establish that Espinoza is an agent of the Respondent within the meaning of Section 2(13) of the Act. There is no evidence showing that the Respondent did anything that manifested Espinoza's authority as an apparent agent, that it was aware of his actions, or that it otherwise held Espinoza out as having authority to speak on its behalf. Unlike Acosta, the other employee of Silza whom the judge found to be the Respondent's agent, there is no evidence that Espinoza had any identifiable responsibility for the Respondent's business operations administered by Silza at its Nogales, Mexico facility that would support the conclusion that he was acting on the Respondent's behalf. In the absence of such evidence, the employees' characterizations that Espinoza was a supervisor or manager of the Respondent only demonstrates their subjective belief, not proof of Espinoza's

legal status. Espinoza's alleged statements, as reflected in the testimony of various employees recounted above, are also inadequate proof because they represent no more than the statements of the putative agent. Because we reverse the judge's finding that Espinoza was an agent of the Respondent, we consequently dismiss the 8(a)(1) violation attributed to him.

3.

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) when Dispatcher Gabriel Velasco interrogated and threatened employees and created the impression of surveillance. We also agree with the judge's finding that the Respondent violated Section 8(a)(1) when Accounting Manager Meraz promised employees a wage increase if they voted against the Union, and threatened employees with the loss of that increase if the Union was successful.

Meraz directed the Respondent's antiunion campaign at Nogales. To this end, Meraz held six or seven group meetings with two to four drivers per group to convince them not to support the Union. At those meetings, the drivers pushed for specific information about improvements in wages and benefits. Although Meraz told them that he could not make promises concerning what would happen to their wages and benefits, he also told them that "everything was on hold because of the election." The drivers, who were aware that the Respondent had granted a 10-percent bonus to both the El Paso and the San Diego drivers *after* the Union filed its petition to represent the Nogales drivers, questioned Meraz about the possibility of such a bonus for Nogales. Meraz replied that "what happened in Tijuana [San Diego], happened in Juarez [El Paso]."

An employer violates Section 8(a)(1) when it promises, explicitly or implicitly, to grant a benefit contingent on employees relinquishing support for a union. *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994). In the circumstances presented here, we find that employees would reasonably interpret Meraz as having promised to grant a wage increase. Indeed, Meraz' statements amounted to an implicit promise that the same increase it had granted at its other locations would be bestowed upon the Nogales employees if they rejected the Union. Concomitantly, Meraz implicitly threatened the employees that, if they selected the Union, they would not receive the increase.

The Respondent was well aware that one of the main reasons that the Nogales drivers sought out the Union was to improve their wages. Armed with this knowledge, the Respondent announced improved wages for the El Paso and San Diego drivers, but not for the Nogales drivers. By answering the driver's questions at the meeting as he did, Meraz strongly suggested to the employees, and the employees would have reasonably inferred, that a defeat for the Union would mean that they, too, would receive the 10-percent increase. See *Curwood, Inc.*, 339 NLRB 1137, 1148–1149 (2003), enfd. in part 397 F.3d 548 (7th Cir. 2005). They would also have understood that, if they stood by the Union, the increase would not be forthcoming. There was no indication in Meraz' remarks that the Respondent told employees that the wage increase that it granted elsewhere would simply be deferred until after the election, without regard to the outcome. Cf. *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995) (employer assured employees that raise would be given after the election and that it would be made retroactive).[14]

B. The 8(a)(3) and (1) Violations

1. The El Paso discharges

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) and independently violated Section 8(a)(1) by discharging the nine El Paso-based drivers who had engaged in a work stoppage.

a.

As set forth in detail in the judge's decision, the El Paso drivers persistently confronted the Respondent about their wages and working conditions. Specifically, they repeatedly demanded a raise, improved truck maintenance, and compliance with Department of Transportation (DOT) regulations. The drivers were also concerned about the Respondent's plans regarding the sale of excess diesel fuel.[15]

By the end of the summer of 2004, the Respondent had not granted any of its drivers a raise or improved any of their working conditions, and the drivers began discussing the possibility of a walkout. In early September, El

[14] Chairman Battista would not find, on these facts, that the Respondent promised the Nogales drivers a wage increase. In response to employee questions, Meraz clearly told the employees the fact that the San Diego and El Paso drivers had been granted a wage increase after the Union had filed the petition in Nogales. However, Meraz clearly told the employees that he could make no promises to them, and that "everything was on hold until after the election." In these circumstances, the employees could not reasonably believe that a wage increase would be forthcoming. They were told precisely the contrary.

Even weaker is the allegation that the Respondent was conditioning a wage increase on defeat of the Union. As noted above, there was no promise of a wage increase, and thus there was no promise on which a condition could be attached. In addition, nothing whatsoever was said or implied about the consequences of a union defeat.

[15] The judge found that, at least until July 2003, drivers who sold excess diesel fuel "did so as part of their approved compensation." After this point, the judge found the Respondent sent "mixed signals" to the drivers.

Paso driver Efren Munoz handed Meraz a written petition outlining the drivers' concerns about excessively long waiting times at the border, poor truck maintenance, and receiving their pay on Mondays rather than Thursdays. The petition also demanded that Operations Manager Gardea be replaced, and that the drivers receive a raise in view of the Respondent's impending control of the drivers' diesel sales.[16]

On Saturday, September 11, nine El Paso-based drivers engaged in a work stoppage and asked to schedule a meeting with the Respondent to discuss their concerns. On September 13, the striking El Paso drivers met with the Respondent's representatives, including Meraz, at the Silza facility in Juarez, Mexico. At this meeting, the drivers again asked for a wage increase in lieu of income from the sale of diesel fuel. Meraz told the drivers that there would be no raise and that everything would remain the same. Meraz also told the drivers that the Respondent could not lose another day without transporting propane and that the Respondent needed to know at that moment who wanted to continue working and who did not.

The striking drivers then took an agreed-upon lunchbreak and conferred via radio with employee Delgadillo in Nogales, who advised them to speak with the Union. After talking with Delgadillo, the drivers decided to return to work the next day. After lunch, they told Meraz that they were willing to return to work but they were going to be speaking with somebody from the Union and could not give him a "final answer" until the next day. In reply, Meraz demanded to know who was willing to continue working for the Respondent and who was not. He instructed those who wished to leave to signal this individually. The drivers refused, telling Meraz their decision would be made as a group. At this point, Meraz handed out letters of resignation, written in English, which the majority of drivers could not read. Driver Alonso Alonso read the letters and told the other drivers not to sign them, because the letters stated that the drivers were resigning voluntarily. None of the drivers signed the letters, and they immediately left the Silza facility. They retained the keys to their trucks and the Respondent took no action consistent with firing them on that date.

The following day, September 14, the drivers assembled at a local truckstop. They called Meraz and told him that they were ready to go back to work. Meraz responded that they had been fired effective the previous day. When asked why they had been fired, Meraz responded that the drivers had not paid any attention to what the Respondent had asked of them.[17]

Driver Manuel Gonzalez did not strike, but, rather, had been on approved leave during the 2-day work stoppage. Although he thought that he had been fired, Gonzalez subsequently learned from Gardea that he had not been. Several days later, Gonzalez had a conversation with Supervisor Acosta. Gonzalez testified that Acosta told him that the nine drivers were all fired because "they were asking for money," i.e., they had demanded a raise. Acosta told Gonzalez that it was Gardea who had given him this reason for terminating the drivers. Driver Manny Hernandez testified that Acosta admitted to him that the drivers had been fired for demanding a wage increase.

b.

An employer violates Section 8(a)(1) of the Act when it discharges employees who engage in concerted activities that are protected under the Act. In the absence of special circumstances, a strike to secure higher pay is protected concerted activity. *ABC Prestress & Concrete*, 201 NLRB 820, 825 (1973). It is clear that the El Paso-based drivers struck over their concerns related to wages, hours, and working conditions. This is protected concerted activity in its most basic form. Further, the Respondent admitted that it fired the drivers for refusing to work. As a result, their terminations for engaging in protected concerted activity were in violation of Section 8(a)(1) of the Act.

In its exceptions, the Respondent contends that the strike was illegal and therefore unprotected. The Respondent asserts that employee testimony as to the purpose of the strike was merely a pretext for the employees' true, illegal motivation, namely the drivers' desire to supplement their income, because they were no longer permitted "to steal" diesel fuel from the Company.[18]

[16] Meraz testified that the drivers were demanding to be compensated at the rate of 75 percent of the savings that the Respondent received through controls on the diesel allocation. The drivers disputed this testimony. The judge found that while it is unclear exactly how much additional compensation the drivers were seeking, there is no question that some additional amount was being requested.

[17] Contrary to the Respondent's exception, we agree with the judge that the Respondent discharged the El Paso drivers on September 14, not September 13. September 14 was the first time that the drivers were told unequivocally of their termination and, therefore, the discharges were not apparent until this date. "In determining whether or not a striker has been discharged, the events must be viewed through the striker's eyes and not as the employer would have viewed them." *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982).

[18] In its exceptions, the Respondent also contends that by parking their trucks on the Mexican side of the border, the striking drivers had "expropriated" its property. The Respondent likens the situation to an in-plant work stoppage. We reject the contention. There is no evidence that the striking employees had moved their trucks from the location at the Silza facility where they had been parked in the normal course at the end of the workday prior to the strike, and there is no indication that

After examining the record and the judge's credibility resolutions, we reject the Respondent's "illegal object" defense. The judge found, and we agree, that the drivers did not steal fuel from the Respondent, in that the evidence shows that the Respondent's management was aware of this practice and had condoned it for years.[19] The drivers struck in furtherance of the demands outlined in their petition. Accordingly, their strike was not illegal, but protected.

c.

We agree with the judge that the Respondent also violated Section 8(a)(3) and (1) when it discharged the striking drivers. Although at the time of their strike the El Paso drivers were not represented by the Union and were not actively engaged in an organizing campaign, the drivers informed Meraz that before they would be returning to work, they were going to be speaking with somebody from the Union. In reply, Meraz demanded that if the strikers could not commit to immediately returning to work, they were to sign resignation letters.

To establish a violation of Section 8(a)(3) under *Wright Line*,[20] the General Counsel must make an initial showing that the employee's union activity was a motivating factor in the employer's adverse action against that employee. To meet that burden, the General Counsel must show that the employee engaged in union activity, that the employer was aware of that activity, and that the employer had shown animus toward protected conduct. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). If the General Counsel meets this initial burden, the Respondent must prove that it would have taken the same action even if the employee had not engaged in union activity.

In this case, the judge properly found that the General Counsel met his initial burden of proving that union activity was a motivating factor in the Respondent's decision to terminate the strikers. There is no doubt that the nine El Paso drivers were engaged in union activity when, on September 13, they agreed to contact the Union before ending their strike. Second, the Respondent became aware of the El Paso-based drivers' interest in the Union when the drivers so informed Meraz. This was also the date the Respondent received a copy of the representation petition filed by the Union on behalf of the Nogales drivers. The receipt of the petition likely made the statement by the El Paso drivers that they were going to be contacting the Union all the more significant to the Respondent.

The Respondent also demonstrated animus toward its employees' protected conduct. The Respondent was engaged in a coordinated and deliberate effort to frustrate both its Nogales-based and El Paso-based drivers in the exercise of their Section 7 rights. Animus is amply demonstrated by the numerous unfair labor practices committed by the Respondent. See *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006). Such actions were a clear manifestation of the Respondent's hostility toward both the union activity of the El Paso drivers, and their protected concerted activity in striking.

The Respondent does not deny terminating the drivers for striking, but argues that the strike was unprotected because of an alleged unlawful object and because the drivers had "expropriated" its trucks. As explained, we have rejected both of these defenses. Accordingly, we agree with the judge's conclusion that the Respondent failed to demonstrate that it would have taken the same action absent the protected conduct.

2. The Nogales discharges

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act and engaged in objectionable conduct by discharging Ryburn and Delgadillo. These employees were discharged after the representation petition was filed but before the election.

a.

As set forth in detail in the judge's decision, among the Nogales-based drivers, Ryburn and Delgadillo were vocal in bringing to the Respondent's attention the drivers' various complaints, which were longstanding. These were the same complaints that troubled the El Paso-based drivers, including salary and benefits, waiting time at the border, safety, and truck maintenance. The Respondent

---

the trucks were immobilized, disabled, or hidden, or that its managers or other drivers did not have ready access to them. Accordingly, we find no merit in this exception. We need not and do not pass on whether the Respondent was procedurally barred from raising its expropriation argument because it failed to plead it in its answer to the complaint or raise it at the hearing.

[19] These conclusions are based, in part, on the credited testimony of numerous drivers who testified to selling the diesel fuel, and who believed that it was part of their compensation. The judge also credited the testimony that the sale of excess diesel fuel was a longstanding practice, and that there was nothing covert about it. In particular, several drivers testified that they openly sold fuel in front of dispatcher Velasco. Finally, the judge credited drivers who testified that this practice was condoned by the Respondent and had even been characterized as remuneration.

In particular, the judge noted that during a meeting between the El Paso drivers and Managers Gardea and Meraz, at the Silza facility in May, Gardea and Meraz told the drivers that they needed time to find a way to give the El Paso drivers a $20 raise per trip. When one of the drivers asked them whether the drivers should continue to sell excess diesel fuel while management attempted to find the money for the raise, either Gardea or Meraz responded yes.

[20] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

was generally unresponsive. It was in that context that, in mid-August, the drivers met to discuss continued complaints about their wages and working conditions, and also the prospect that the El Paso-based drivers might strike. The Nogales drivers agreed among themselves that they would not drive the El Paso drivers' routes if the Respondent asked them to do so. The drivers discussed the possibility that, if they drove the routes, the El Paso drivers or their friends might seek retribution. Further, they discussed their unresolved complaints about their employment, and a decision was made to contact the Union to determine whether representation would be helpful. It was Ryburn who contacted Campbell to schedule an organizational meeting with the drivers.

On August 30, Campbell held a meeting with about 14 drivers at a local restaurant and explained to them how the Union worked and how it could help them. Campbell spoke in English, and Ryburn and Delgadillo translated for the other, principally Spanish-speaking drivers. When Campbell finished speaking, 13 drivers signed union authorization cards and gave them to Campbell. Later that day, and during the next few days, Ryburn obtained authorization cards from several more drivers.

In mid-September, Delgadillo was informed by Dispatcher Velasco, a supervisor, that drivers were needed to "help in El Paso," because the Respondent had "fired all the other drivers." Velasco attempted to induce most of the Nogales drivers to drive the El Paso routes and told certain of them that if they refused, they would be terminated. All the Nogales drivers, however, refused. As the judge found, for some drivers, there was an interest in demonstrating solidarity with the El Paso-based drivers, while for others, there was a fear that if they drove the routes, the El Paso drivers might seek to harm them for undermining the strike.

At this point, the Nogales drivers decided to "go public" with their organizing efforts. Employee Ryburn openly distributed union paraphernalia at the Respondent's Nogales office. Velasco was present at the time and even asked Ryburn for a union key chain. Ryburn consistently wore a union pin until he was terminated. Delgadillo placed a union bumper sticker on the dashboard of his personal vehicle, which he customarily parked in front of the Respondent's Nogales office. Subsequently, Velasco began to question Ryburn about the Union on a daily basis.[21]

Approximately a week after he handed out the union paraphernalia, Ryburn, along with Delgadillo, was terminated. Their termination letters were substantively identical. The Respondent stated that Ryburn and Delgadillo were responsible for inciting other drivers into not complying with the Company's operational needs, and that the Respondent received several complaints from other drivers that Ryburn and Delgadillo threatened them with the purpose of dissuading them from driving the El Paso drivers' routes.

b.

Analyzing this case under the *Wright Line* framework outlined above, we agree with the judge that the General Counsel met his initial burden of proving that Ryburn's and Delgadillo's union and other protected conduct was a motivating factor in the Respondent's decision to terminate the employees.

There is no doubt that the employees were engaged in union and other protected concerted activity. Second, the Respondent was aware of this activity. As stated by the judge, from the inception of the organizing campaign, Velasco indicated to the drivers his knowledge of their union activity. Velasco testified that the reason he spoke specifically to Ryburn and Delgadillo was because he considered them "knowledgeable about the Union." Further, Ryburn openly distributed union paraphernalia in front of Velasco.

Additionally, as mentioned above, the Respondent demonstrated animus toward employees' union and other protected concerted activities by committing numerous unfair labor practices. Animus is also demonstrated by the credited testimony of driver Sene, who testified as to an admission by Velasco of the Respondent's motive for the discharges: Velasco told Sene, approximately a week after the terminations, that Ryburn and Delgadillo were fired because "they were trouble makers and they were instigators, and that they were trying to form a union."[22]

We also agree with the judge that the Respondent failed to show that it would have taken the same action absent the protected conduct. The Respondent contends that Ryburn and Delgadillo were terminated because they threatened other Nogales-based drivers with physical harm in an effort to dissuade them from driving the El Paso drivers' routes during the strike. The judge credited the testimony of Ryburn and Delgadillo, however, that they did not threaten any Nogales driver with physical

[21] Such questions included, "how does the union work? . . . What benefits? . . . . What can the Union do for you?"

[22] The timing of the discharges is also suspicious, and supports the inference that they were motivated by union animus. The Respondent discharged Ryburn and Delgadillo, two leading union supporters, during the critical period and approximately 1 week after they went public with their union activity. See *Control Building Services*, 337 NLRB 844, 845 (2002) (finding that timing of discharge, which occurred 5 days after employer observed discharged employee leafleting and 8 days after he presented a protest letter, supported an inference that union animus motivated the discharge).

harm. A number of Nogales-based drivers supported that testimony, and indicated that they had heard no such threats.[23] It is clear that the drivers discussed among themselves the possibility that if they drove those routes, the El Paso-based drivers or their friends might seek retribution. However, we agree with the judge that such discussions are far from constituting evidence that either Ryburn or Delgadillo personally threatened to cause physical harm.[24]

Further, even accepting the Respondent sincerely believed that Ryburn and Delgadillo had threatened coworkers with violence, we find that the Respondent has failed to prove that it would have discharged them for such misconduct, had they not engaged in union activity. We agree with the judge that Gardea was suspiciously quick to grasp onto any alleged reason to fire Ryburn and Delgadillo. He did not conduct a credible investigation to determine whether the two drivers had actually made any threats of violence, never having contacted either man. In fact, the first time that Gardea heard them deny making any threats of violence was when he fired them. Additionally, the Respondent has tolerated several instances of actual violence[25] and could not identify a single other employee who was terminated merely for threats. Accordingly, we conclude that the Respondent's stated reason for the discharges was pretextual.[26]

3. Negative employment references

We agree with the judge that the Respondent, after unlawfully discharging Ryburn and Delgadillo, violated Section 8(a)(1) by giving negative employment references about them.

Following their terminations, Ryburn and Delgadillo considered applying for employment with Coastal Transport, one of the Respondent's competitors. They called Wendy Thompson, a Coastal Transport manager, who told them that they should apply for work. Before submitting applications, Ryburn and Delgadillo discussed the fact that their recent terminations might present a problem for Coastal in hiring them. At the time, Coastal did not have an office in Nogales, Arizona, but instead had an arrangement with the Respondent pursuant to which Coastal drivers picked up customs documents at the Respondent's office in Nogales. Coastal drivers were in effect required to stop at the Respondent's Nogales office for those documents, before attempting to cross the border.

Ryburn and Delgadillo called Thompson back and began to explain their belief that they had been fired for union activity. However, she interrupted them to say that she had just spoken to Gardea, and he did not want them at the Respondent's Nogales office. Gardea confirmed this conversation and said that he had no problem with the two men working for Coastal, but that he did not want them in the Respondent's office and "did not want them near California Gas drivers." Ryburn and Delgadillo were not interested in other routes that did not require them to stop at the Respondent's facility.[27] Neither formally submitted an application to work for Coastal.[28]

An employer may not, for the purposes of punishing an employee for exercising Section 7 rights or engaging in union activity, seek to prevent another employer from hiring the employee. *Kaiser Steel Corp.*, 259 NLRB 643, 646 fn. 14 (1981), enf. denied on other grounds 700 F.2d 575 (9th Cir. 1983); *Looney Sheet Metal Construction Co.*, 160 NLRB 1635, 1649 (1966). Here, the credited testimony makes it clear that Thompson was interested in hiring Ryburn and Delgadillo for the preferred routes. However, Gardea's refusal to allow the two drivers to use the Respondent's facility in Nogales effec-

[23] Further, the judge did not credit Gardea's testimony regarding employees who had supposedly complained about Ryburn and Delgadillo.

[24] The comments attributable to Ryburn and Delgadillo that there could be consequences for driving to Juarez, as in that "would not be the end of it," were merely expressions of the very real possibility that the El Paso-based drivers would not look kindly upon the Nogales drivers taking their routes. The remaining evidence, that drivers were told that they could be "f—d up" if they drove the Juarez routes, was attributed by the judge to another employee.

[25] The evidence is undisputed that both drivers, Valenzuela and Curiel, assaulted coworkers, and yet neither man was terminated for the incident.

[26] Chairman Battista need not and does not rely on the Respondent's (allegedly inadequate) investigation of Ryburn and Delgadillo's alleged misconduct to find that the Respondent violated the Act by discharging them. Chairman Battista notes that a respondent's failure to investigate employee misconduct does not invariably support a finding that an employer acted with unlawful motivation. See *Consolidated Biscuit Co.*, 346 NLRB No. 101, slip op. at 6 fn. 26 (2006); *Hewlett Packard Co.*, 341 NLRB 492, 492 fn. 2 (2004) (same). The Board must consider all the circumstances, and a failure to investigate is merely one of many factors to consider in determining motivation. For example, the fact that an employer usually investigates misconduct, but did not investigate an alleged discriminatee's misconduct, may help to support an inference of unlawful motivation. Chairman Battista finds that the Respondent failed to prove that it would have terminated Ryburn and Delgadillo for allegedly uttering threats of violence, even absent their union activity. As the majority explains, the Respondent tolerated several instances of actual violence and failed to identify any other employee who was terminated for threatening violence. Under these circumstances, the Respondent failed to satisfy its *Wright Line* rebuttal burden, and hence the Chairman finds the violations.

[27] Ryburn was not interested in other Coastal routes because they paid less. Delgadillo wanted only the Nogales route because it was close to his home.

[28] Contrary to the Respondent's contentions, it is immaterial that Ryburn and Delgadillo never officially applied to Coastal. Once they were told that they would not be hired for their desired routes, it would have been futile for them to complete the application process.

tively precluded Thompson from hiring them for these routes, and that constraint was communicated by Thompson to Ryburn and Delgadillo. We agree with the judge that, regardless of the explanation he gave Thompson for not wanting Ryburn and Delgadillo in contact with the Respondent's employees, Gardea's reasons emanated from their union and other protected concerted activities while employed by the Respondent. Such conduct by the Respondent would interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. See *Armstrong Rubber Co.*, 215 NLRB 620 fn. 1 (1974).

III. REMEDY

A. Gissel Bargaining Order

The Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases: those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614 (1969). The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede election processes." Id. at 614. In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and [, therefore,] employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." Id. "In determining the propriety of a remedial bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred course is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. *Aqua Cool*, 332 NLRB 95, 97 (2000). See also *Concrete Form Walls, Inc.*, 346 NLRB No. 80, slip op. at 7–8 (2006).

Based on the Respondent's unfair labor practices, the judge found this was at least a category II case, and recommended that the Board issue a bargaining order covering the Nogales-based drivers. After carefully examining the record, we agree with the judge that this is a *Gissel* category II case. In reaching this conclusion, we have evaluated the extensiveness of the Respondent's unfair labor practices to determine whether the Board's traditional remedies are sufficient to negate the coercive impact of the violations on the employees' right to freely choose whether to be represented. See *Michael's Printing, Inc.*, 337 NLRB 860, 861 (2002), enfd. 85 Fed. Appx. 614 (9th Cir. 2004). We find that they are not.

At both its Nogales and El Paso facilities, the Respondent engaged in a calculated and systematic campaign to frustrate and suppress the Section 7 activities of its employees. As discussed in detail above, the Respondent committed numerous violations of the Act, including "hallmark" violations (see below). The magnitude of those violations was compounded by the fact that the unit at issue (the Nogales drivers) was small, the Respondent commenced its campaign of unfair labor practice immediately after it found out that its employees were engaging in union activities, and high-level officials of the Respondent were involved in committing the violations. As evidenced by the results of the representation election, those violations had a demonstrated negative effect on employees. Further, we reject the Respondent's contentions that the violations committed against the El Paso-based drivers do not provide support for a bargaining order in the Nogales unit, and that changed circumstances militate against issuing a bargaining order.

In its overall course of unlawful conduct, the Respondent committed "hallmark" violations of the Act, a description which applies to the most flagrant forms of interference with Section 7 rights. Such violations are more likely to destroy election conditions for a longer period of time than other unfair labor practices. The Respondent's discharge of Ryburn and Delgadillo, both leaders of the union organizing drive, "goes to the very heart of the Act" and is not likely to be forgotten soon. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).[29] Additionally, even after it had illegally discharged Ryburn and Delgadillo, the Respondent continued to punish them for exercising their Section 7 rights. The Respondent gave negative employment references to a prospective employer in order to ensure that they would have no further contact with drivers at Nogales. Further, the Respondent unlawfully discharged nine other nonunit employees who engaged in a protected work stoppage in El Paso. In both Nogales and El Paso, supervisors explicitly told the remaining employees that the discharges were based on the employees' concerted

[29] See also *NLRB v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (5th Cir. 1965) ("Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort.").

conduct.[30] "Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity." *Consec Security,* 325 NLRB 453, 454 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999). As explained below in further detail, given the interaction between the Nogales employees and the El Paso employees, the Respondent's unlawful mass discharge in El Paso would have a lasting impact on the Nogales employees. There is no basis to isolate the Nogales drivers from the effects of the Respondent's misconduct directed at the El Paso drivers.

The coercive impact of the Respondent's unfair labor practices is unmistakable. First, the size of the Nogales employee unit was small, consisting of 19 employees. In a group that size, the severity of the Respondent's unfair labor practices predictably would have a deep, lasting impact on every employee. The total of 11 discharges was approximately one-third of the drivers employed at the two locations. The facts surrounding all of the discharges show that the Respondent's actions were intended to "send a message" to other employees that union and other concerted activity would not be tolerated, and that the Respondent would engage in a degree of retaliatory misconduct even to the point of discharging a significant portion of its work force. See, e.g., *Debbie Reynolds Hotel*, 332 NLRB 466, 467 (2000); *Traction Wholesale Center Co.*, 328 NLRB 1058, 1077 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000). Second, the Respondent began its campaign of unfair labor practices almost immediately. Within 24 hours of the employees' first meeting with a union representative, several weeks before the employees went public with their campaign, Velasco interrogated and threatened employees and created the impression of surveillance.[31] See *Michael's Painting, Inc.*, 337 NLRB at 861; *Concrete Form Walls, Inc.*, 346 NLRB No. 80, slip op. at 8.

The Respondent's unlawful conduct is further compounded by the involvement of high-level officials. Operations Manager Gardea, who oversaw all of the Respondent's operations, fired Ryburn and Delgadillo in Nogales. Accounting Manager Meraz promised the Nogales employees a wage increase if they voted against the Union and threatened the employees with a loss of a wage increase if the Union was successful.[32] Meraz also fired the nine strikers in El Paso. "When the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *Michael's Printing, Inc.*, 337 NLRB at 861. See also *Concrete Form Walls, Inc.*, 346 NLRB No. 80, slip op. at 8; *Consec Security,* 325 NLRB at 545–545; *Ron Junkert*, 308 NLRB 1135, 1135–1136 (1992).

The effectiveness of the Respondent's unlawful assault on its employees' Section 7 rights is illustrated by the clear dissipation of union support that resulted. The Union had obtained 16 valid authorization cards from a unit of 19 employees. Less than 2 months later, however, on October 18, the Union may have received as few as 4 votes in the election.[33]

In view of the nature of the Respondent's violations, we conclude that the possibility of erasing the effects of the unfair labor practices and conducting a fair election is slight. Under these circumstances, simply requiring the Respondent to refrain from unlawful conduct and offer reinstatement and backpay to the unlawfully discharged employees will not eradicate the lingering effects of the hallmark violations committed and will not deter their recurrence.

Contrary to the Respondent's contention, the Respondent's unfair labor practices directed against nonunit El Paso-based drivers are inextricably linked with its unfair labor practices against the Nogales-based drivers, and therefore provide support for a *Gissel* bargaining order at Nogales. See *Holly Farms Corp.*, 311 NLRB 273, 282 (1993) (out-of-unit violations appropriately considered for *Gissel* remedy, where conduct concentrated among units close to each other, employer's labor relations centrally controlled, unlawful conduct overt and highly publicized, and employer brought violations to the attention

[30] Velasco made it clear to driver Sene that Ryburn and Delgadillo were fired because they were "troublemakers, instigators," and "trying to form a union." The message was clear: if you support the Union, be prepared to face a fate similar to Ryburn and Delgadillo. The Respondent also told El Paso drivers who were not terminated that the nine drivers who were terminated were all fired because "they were asking for money," i.e., they had demanded a raise.

[31] Velasco interrogated driver Felipe Navarro by asking him what he thought about the Union. Navarro responded that he didn't know much, and invited Velasco to explain it to him. Velasco told him "things were getting bad, difficult, and were going to get worse." We agree with the judge that this was Velasco's way of saying that the union campaign would inevitably end badly for its supporters. Further, Velasco blatantly told Navarro that he should think about whether to continue with the Union, because it might not be in his best interest to do so. Shortly after Ryburn first contacted Campbell, Velasco asked him whether he (Velasco) could join the Union. Ryburn feigned ignorance, but later that evening Velasco called him at home, and asked again about joining the Union. Velasco said, "Hey, I would really like to go into the Teamsters. I know that you guys are bringing the Union in." Ryburn again feigned ignorance of any union campaign.

[32] Chairman Battista would dismiss these 8(a)(1) allegations. See fn. 14. Nevertheless, he agrees with his colleagues that a *Gissel* bargaining order is warranted in light of the Respondent's other unfair labor practices.

[33] There were three unopened, challenged ballots.

of unit employees), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995).

Both groups of employees had the same complaints regarding wages, hours, and working conditions, and the record demonstrates that members of the two groups of employees were in contact with each other. When the Nogales drivers met in August, Delgadillo informed them that the El Paso drivers were planning a work stoppage. The Nogales drivers discussed the possibility of participating in their own work stoppage to maximize the work stoppage's effect and to emphasize their problems with management, but Delgadillo mentioned that the Respondent had fired many Nogales drivers when they had gone on strike 2 years before. As mentioned above, responding to a request by the El Paso drivers, the Nogales drivers agreed that they would not serve as strike breakers by driving the El Paso routes if the El Paso drivers held a work stoppage.

When the El Paso strike commenced in early September, the Nogales drivers were well aware of this concerted action, and they later became aware of the Respondent's subsequent terminations of the nine strikers. El Paso driver Gonzalo Munoz telephoned Delgadillo twice: first to let him know that the El Paso drivers had gone on strike and then to let him know that they had been fired. After the terminations, Velasco contacted Delgadillo, asked him to drive an El Paso route, and told him that the Respondent needed help in El Paso because it had just fired "all the other drivers." Velasco also asked Delgadillo to contact other drivers to ask them to help in El Paso, and Delgadillo did so by contacting drivers Jesus Covarrubias and Jorge Curiel. Covarrubias and Curiel told Delgadillo that they would not work in El Paso, and Delgadillo then told Velasco that none of the three of them would drive an El Paso route. Similarly, Velasco contacted a group of Nogales drivers that included Hector Lopez, and told them that the Respondent needed six volunteers to help in El Paso because the El Paso drivers had been fired. Lopez asked what would happen if they did not drive the routes and Velasco responded that, if six volunteers did not step forward, he would choose six drivers who would be fired if they refused to go. The Respondent's actual misconduct against the El Paso drivers demonstrates that the statement was not to be understood as mere hyperbole.

Further, the discharge of the El Paso drivers occurred the day after the Respondent received the Nogales-based drivers' representation petition. Drivers in Nogales were aware that the El Paso drivers were going to contact the Union. However, the Respondent was also aware of this and was able to crush a potential second organizing drive before it even got off the ground by firing all the striking drivers. This could not reasonably have been lost on the Nogales drivers. Thus, the discharge of the El Paso strikers was closely connected to the Nogales unfair labor practices, was publicized by the Respondent to the Nogales drivers, and the Nogales and El Paso drivers were clearly aligned in their Section 7 activities.

In its exceptions, the Respondent also argues that a bargaining order is inappropriate because of changed circumstances, i.e., employee turnover.[34] We find no merit in that contention. As the Board noted in *Garvey Marine*, 328 NLRB at 995:

> The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy based on the situation at the time the unfair labor practices were committed. Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing. These effects include the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations. Such a result would permit employers, particularly in businesses . . . that experience significant turnover in normal circumstances, to disregard the requirements of the Act with impunity, with little expectation of incurring the legal consequences of their violations. In addition, the Board has noted that a bargaining order's impact on employee free choice is limited, because employees remain free to reject their bargaining representative after a reasonable period of time. [Citations omitted.]

See also *Aldworth, Co., Inc.*, 338 NLRB 137, 151 (2001), enfd. sub nom. *Dunkin Donuts Mid Atlantic Dist. Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir 2004); *Parts Depot, Inc.*, 332 NLRB 670, 676 (2000).

Nevertheless, some courts have criticized the Board's refusal to consider the passage of time and turnover in

[34] The Respondent identifies in its brief 10 Nogales-based employees who had ceased being employed by it prior to the close of the record, but does not assert the existence of any other relevant information as to employee turnover or attrition. Even as to this limited evidence, the Respondent overlooks that one of the identified drivers, Aaron Catron, quit before August 30, and was not among the 19 employees the parties stipulated were employed by the Respondent in the bargaining unit as of the relevant date for determining majority status. Further, the Respondent's reliance on employee departures that arose after August 30 is partially offset by our remedial order directing the reinstatement of employees Ryburn and Delgadillo, whom it had unlawfully terminated.

evaluating the appropriateness of a remedial bargaining order.[35] Accepting, *arguendo*, that changed circumstances are a relevant factor in a *Gissel* analysis, we would still issue a bargaining order. We find that the effects of the unlawful conduct are unlikely to be sufficiently dissipated by turnover to ensure a free second election. Although a number of the employees who were employed at the time of the unlawful conduct surrounding the election may have left the Nogales facility, others who remain would recall the serious unfair labor practices committed at both the Nogales and El Paso facilities. In addition, the Respondent has not contended that any of its managers, supervisors, or agents involved in the unlawful conduct cease to be in its employ.

We further find that the new employees may well be affected by the continuing influence of the Respondent's past unfair labor practices. As the Fifth Circuit has recognized, "[p]ractices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978). In the present case, it is difficult to believe that the impression made by the Respondent's barrage of unlawful conduct could have dissipated in the minds of those employees who were then employed, and that the virulence of the Respondent's response to its employees' union and other protected concerted activities would not restrain employee free choice in a second election.[36] The Respondent has not offered any evidence that it attempted to mitigate the effects of its unlawful conduct and has presented no evidence showing a new willingness to allow its employees to freely exercise their rights.[37]

For all of the reasons above, as well as those set forth by the judge, we conclude that the conduct of a fair election in the future would be unlikely, and that the employees' representational desires, expressed through authorization cards, would be better protected by a bargaining order than by traditional remedies. Thus, we agree that a *Gissel* bargaining order at Nogales is necessary and appropriate in this case, and we therefore adopt the judge's recommended remedy.[38]

B. The 8(a)(5) Allegations

Because we agree with the judge that a Gissel bargaining order is appropriate, we also agree, for the reasons stated in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union, making unilateral changes, and engaging in direct dealing.[39]

We affirm the judge's finding that the Respondent's bargaining obligation commenced on August 30, 2004, the date that the Union achieved majority status, for the following reasons. In *Peaker Run Coal Co.,* 228 NLRB 93 (1977), the Board held that where the union has not made a demand for recognition,[40] the respondent will be ordered to bargain with the union as of the date on which the respondent initiated its campaign of unfair labor practices if, as of that date, the union had obtained majority status in the bargaining unit. The record in this case shows that the Union achieved majority status among the unit employees on August 30, and did not subsequently demand recognition from the Respondent. Therefore, the bargaining order should be dated from the approximate date thereafter that the Respondent embarked on its course of unlawful conduct. In this case, that day is August 30, the day that the Respondent violated Section

[35] See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171–1173 (D.C. Cir. 1998).

[36] We reject the Respondent's invocation of the doctrine of "unclean hands." According to the Respondent, the reason the drivers sought to form a union was their "continued desire to supplement their income because they were no longer permitted to steal from the company." Therefore, assertedly, the doctrine of unclean hands closes the door of a court of equity to them. First, as mentioned above, we agree with the judge that the drivers were not engaged in the theft of diesel fuel. The record reflects that the drivers were interested in improving their wages, hours and working conditions, and that is why they sought union representation. Second, the "unclean hands" doctrine of equity does not operate against a charging party, because Board proceedings are not for the vindication of private rights, but are brought in the public interest and to effectuate the statutory policy. *Teamsters Local 294 (Island Duck Lumber)*, 145 NLRB 484, 492 fn. 9 (1963), enfd. 342 F.2d 18 (2d. Cir. 1965) citing *NLRB. v. Plumbers Union of Nassau County Local 457*, 299 F.2d 497 (2d Cir. 1962).

[37] Compare *M.J. Metal Products*, 328 NLRB 1184, 1186 (1999), enfd. 267 F.3d 1059 (10th Cir. 2001) (issuing bargaining order and noting the absence of evidence that the employer had attempted to reinstate the discriminatorily discharged employees), *with Desert Aggregates*, 340 NLRB 289, 293–294 (2003) (finding bargaining order unnecessary where the effect on employees of two discriminatory layoffs was mitigated by the employer's attempt to recall those employees as soon as its business improved).

[38] We also agree with the judge that a broad cease-and-desist order is appropriate. The Respondent has engaged in such egregious misconduct, involving numerous violations of 8(a)(1), (3) and (5), as to demonstrate a "general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). These widespread violations are sufficiently serious to warrant a broad order. See *National Steel Supply*, 344 NLRB No. 121, slip op. at 6 fn. 17 (2005); *United Scrap Metal, Inc.*, 344 NLRB No. 55, slip op at 2 fn. 8 (2005).

[39] Because we agree with the judge that the Respondent violated Sec. 8(a)(3) by terminating Ryburn and Delgadillo, we need not pass on the judge's finding that the Respondent also violated Sec. 8(a)(5) by terminating Ryburn and Delgadillo—that additional finding would not materially affect the reinstatement and make-whole remedy for these employees.

[40] The Union's filing of the representation petition is not the equivalent of a demand for recognition. *Production Plating Co.*, 233 NLRB 116 (1977), enfd. 614 F.2d 1117 (6th Cir. 1980); *Eagle Material Handling of New Jersey*, 224 NLRB 1529 (1976), enfd. 558 F.2d 160 (3d Cir. 1977).

8(a)(1) by interrogating and threatening Felipe Navarro, and by creating the impression of surveillance. See *Joy Recovery Technology Corp.*, 320 NLRB 356 fn. 4 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, California Gas Transport, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 28–RC–6316 be severed from Cases 28–CA–19645, 28–CA–19666, 28–CA–20014, 28–CA–20082, 28–CA–20177 and dismissed.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for, or activities on behalf of, the General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters (the Union), or any other union.

WE WILL NOT make it appear to you that we are watching your uion or other concerted activities.

WE WILL NOT threaten you for supporting the Union as your collective-bargaining representative.

WE WILL NOT threaten you for engaging in union or other concerted activities.

WE WILL NOT encourage you to resign your job because you engage in a strike against us.

WE WILL NOT threaten to fire you because you engage in a strike against us.

WE WILL NOT give negative references about you to prospective employers because you were a supporter of the Union, or because you engaged in union or other concerted activities.

WE WILL NOT change or request that you change your normal driving routes without first providing notice to the Union and allowing the Union an opportunity to bargain with us regarding those Nogales-based employees who are represented by the Union.

WE WILL NOT discharge or otherwise discipline you because you are a supporter of the Union, engage in union activity, engage in a strike, or engage in other concerted activity with coworkers concerning your wages, hours, and working conditions.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Nogales-based employees Rogelio Delgadillo and Robert Ryburn and El Paso-based employees Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from out files any and all reference to the unlawful discharge of employees Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Ja-

cinto Hernandez, and notify them in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

WE WILL, within 14 days from the date of the Board's Order, contact Coastal Transportation and retract any negative references given to Coastal about prospective employees Rogelio Delgadillo and Robert Ryburn, indicate that we have no objection to the employment of these prospective employees by Coastal on any of its routes, and inform Delgadillo and Ryburn in writing that this has been done.

WE WILL, upon request, recognize and bargain collectively with General Teamsters (Excluding Mailers), State of Arizona, Local 104, and affiliate of the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative, from August 30, 2004, with respective to the drivers employed in the Nogales-based bargaining unit, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

CALIFORNIA GAS TRANSPORT, INC.

Mara-Louise Anzalone and *Johannes Lauterborn, Esqs.*, for the General Counsel.

Gregg J. Tucek and *Thomas J. Kennedy (on brief), Esqs.*, of Phoenix, Arizona, and *Mark D. Dore, Esq.*, of El Paso, Texas, for the Respondent.

Kathy Campbell, Organizer, of Phoenix, Arizona, for the Petitioner.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in El Paso, Texas, on April 5–8, 11, and 12, and in Tucson, Arizona, on May 23–26, 2005. This case was tried following the issuance of a third consolidated complaint and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on March 25, 2005. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union or the Petitioner). It alleges that California Gas Transport, Inc. (the Employer or the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

Pursuant to a representation petition filed by the Union in Case 28–RC–6316, and a Stipulated Election Agreement executed by the parties and approved by the Regional Director on September 17, 2004,[2] an election by secret ballot was conducted on October 18.[3] The tally of ballots reflected that of 15 ballots cast, 4 had been cast for representation by the Union, 8 had been cast against such representation, and 3 ballots were challenged. The challenges were not sufficient in number to affect the results of the election. On October 25, the Union filed timely objections to conduct affecting the results of the election. Thereafter, on February 28, 2005, the Regional Director for Region 28 issued a report on the investigation of the objections. In his report, the Regional Director found that the Union had provided evidence in support of its objections; the Employer had denied the conduct alleged in the objections; and he ordered that the objections be consolidated with the complaint for purposes of trial before an administrative law judge. (GC Exh. 1(t).)

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record,[4] my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[5] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Texas corporation, with an office and place of business in El Paso, Texas (the Respondent's El Paso facility),

[1] In its answer, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

[2] All dates hereafter are in 2004, unless otherwise indicated.

[3] The election was conducted in the following unit of the Respondent's employees which, the complaint alleges, the answer admits, and I find constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All drivers employed by the Respondent at its Nogales, Arizona, facility located at 2651 Grand Avenue #19, Nogales, Arizona, excluding all other employees, dispatchers, office clerical employees, guards, and supervisors as defined in the Act.

[4] It should be noted that the official reporter in this case inadvertently included in the set of bound exhibits certain documents, which were merely marked for identification, or offered into evidence, but never admitted. Therefore, care should be taken when reviewing the bound exhibits that only those documents actually admitted into evidence by me are part of the official record in this case.

[5] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

and an office and place of business in Nogales, Arizona (the Respondent's Nogales facility), where it has been engaged in the business of transporting propane gas. Further, I find that during the 12-month period ending September 27, 2004, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000; and that during the same period, the Respondent purchased and received at its Nogales facility goods valued in excess of $50,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material, has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

Counsel for the General Counsel amended the complaint a number to times throughout the course of the hearing. As finally amended, the complaint alleges that the Respondent and Transportadora Silza, a Mexican company, are affiliated business enterprises; have been engaged in a joint venture to perform the work of propane-gas delivery from the United States to Mexico; and are joint employers of the of the Respondent's employees.

The Respondent operates facilities in El Paso, Texas, and Nogales, Arizona, where it employs truckdrivers, and it also employs drivers in the San Diego, California area. Transportadora Silza (Silza) operates facilities in the Mexican cities of Juarez, Nogales, and Tijuana. According to the General Counsel, the supervisors and agents of the Respondent and Silza have committed numerous unfair labor practices against the Respondent's employees at the Respondent's facilities in Nogales, Arizona, and El Paso, Texas, and at the Silza facilities in Juarez and Nogales, Mexico. These alleged unfair labor practices have included interrogating employees about their union activities, creating the impression of surveillance, threatening employees with discharge or other reprisals for supporting the Union, promising employees a wage increase for rejecting the Union, threatening employees with the loss of a wage increase for supporting the Union, and by informing employees that their selection of the Union to represent them would be futile. This conduct by the Respondent is alleged in the complaint as a violation of Section 8(a)(1) of the Act.

Further, the General Counsel contends that nine drivers based at the Respondent's facility in El Paso, Texas, were discharged allegedly because they engaged in union and other protected concerted activity, specifically a work stoppage, with the goal of obtaining a wage increase and other benefits, including improved maintenance of their trucks. The complaint names these nine employees as: Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez. These discharges are alleged as violations of Section 8(a)(3) and (1) of the Act. The complaint also alleges that two drivers based at the Respondent's facility in Nogales, Arizona, Rogelio Delgadillo and Robert Ryburn, were discharged because they supported the Union's effort to organize the Respondent's Nogales, Arizona facility, and engaged in other protected concerted activity. For the same reasons, the Respondent allegedly gave negative employment references about Delgadillo and Ryburn to a prospective employer of theirs, Coastal Transport. The discharges of Delgadillo and Ryburn are alleged in the complaint as 8(a)(3) and (1) violations of the Act, while the negative employment references are alleged as 8(a)(1) violations.

It is the General Counsel's position that as of August 30, 2004, a majority of the Respondent's drivers employed at its Nogales, Arizona facility, in the unit described above, designated and selected the Union as their collective-bargaining representative. The General Counsel further contends that since that date, the Union has been the exclusive collective-bargaining representative of the employees in the unit. According to the complaint, the Respondent bypassed the Union and unilaterally changed the normal routes driven by the Nogales-based drivers by assigning them to drive the routes previously driven by the striking or discharged El Paso-based drivers. By this conduct, the Respondent is alleged to have failed and refused to bargain in good faith with the Union within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

The General Counsel contends that the unfair labor practices allegedly committed by the Respondent caused or prolonged the strike engaged in by certain of the Respondent's El Paso-based employees. Further, as set forth in the complaint, the General Counsel seeks as part of the requested remedy, a bargaining order, based on the Union's alleged majority status as established through authorization cards. It is the position of the General Counsel that more traditional remedies, such as a rerun election, would be unlikely to erase the effects of the Respondent's alleged serious and substantial unfair labor practices.

As would be anticipated, the Respondent views this case from a totally different perspective. Preliminarily, counsel for the Respondent takes the position that the Respondent and Silza are totally separate and distinct business entities. Allegedly, the Respondent's principal, if not sole, customer, Universal Gas & Oil, LTD (Universal), contracts with the Respondent to pick up and transport propane gas from refineries in the United States to storage facilities located in Mexico and operated by Silza. According to counsel, the Respondent and Silza are not affiliated business enterprises, are not engaged in a joint venture, and are not joint employers of the Respondent's employees. Further, it is counsel's position that Silza's supervisors and managers are not supervisors or agents of the Respondent's employees within the meaning of Section 2(11) and (13) of the Act, and have not functioned or been held out as such.

Regarding its El Paso-based operation, the Respondent contends that a number of drivers at that location had been stealing diesel fuel for personal sale. According to the Respondent, this had been a practice for some time by many of the drivers at each of its locations, who would "misappropriate" excess fuel

from their trips.[6] In an effort to put a stop to such theft, the Respondent instituted certain controls on the amount of diesel fuel allocated to the drivers for their trips. Allegedly, certain of the drivers in El Paso engaged in a work stoppage in an effort to force the Respondent to allow the drivers to continue stealing diesel fuel, or to compensate them for the loss of this income. It is the position of counsel for the Respondent that as the theft of diesel fuel was illegal, a strike for the purpose of continuing that illegal conduct or to force the Respondent to compensate the drivers for ceasing their illegal conduct would, while concerted, be unprotected activity. Counsel argues that since the strike was unprotected, the Respondent could lawfully discharge the strikers.

In the matter of its Nogales-based operation, the Respondent contends that it had a legitimate business need to assign certain of the Nogales-based drivers to make deliveries to the Silza facility in Juarez, which facility was not normally serviced by those drivers. According to the Respondent, Nogales-based drivers Rogelio Delgadillo and Robert Ryburn made threatening statements to a number of other Nogales-based drivers in an effort to dissuade them from accepting the assignment of routes to El Paso/Juarez. Allegedly, these threats concerned the harm that striking El Paso-based drivers might cause them if they accepted the routes to El Paso/Juarez. It was for this reason that the Respondent contends that Delgadillo and Ryburn were discharged.

Counsel for the Respondent denies that any drivers based in either El Paso or Nogales were discharged because they engaged in either union or protected concerted activities. Further, counsel denies that any of the Respondent's supervisors or agents interfered with, restrained, or coerced its employees in the exercise of their right to engage in Section 7 activity. Finally, counsel denies that the Respondent had any bargaining obligation toward the Union, disputing the General Counsel's contention that the Union ever represented a majority of the employees in the unit found appropriate, as set forth above.

The Order of the Regional Director for Region 28 consolidating these cases for hearing and decision notes that common issues exist between the objections to the results of the election filed by the Union in Case 28–RC–6316 and the unfair labor practice charges. Moreover, it appears to the undersigned that the outstanding objections are now full encompassed by the unfair labor practice charges as alleged in the complaint. Accordingly, a resolution of those charges will also be dispositive of the objections.[7]

B. The Undisputed Facts

The parties dispute many of the facts in this case. However, there are certain factual matters regarding the nature of the Respondent's business, which have not been rebutted by the General Counsel. This unrebutted evidence comes from the testimony of Ernesto Flores Escarzaga (Flores), who testified that he is the owner of the Respondent; from Oscar Gardea (Gardea), operations manager; from Joel Meraz (Meraz), accounting manager; and from certain documentary evidence.

From this unrebutted evidence, it has been established that the Respondent is a Texas corporation, which is in business to transport liquid petroleum gas (LPG, or propane gas). At the time of the hearing, the Respondent had only one customer, Universal Gas & Oil, LTD (Universal), which is a corporation of the Bahamas. Universal is in the business of purchasing LPG exclusively for resale to Petrileos Mexicanos (Pemex) in Mexico.[8] Universal purchases LPG from suppliers in the United States, and arranges for motor transport of the LPG directly to storage facilities in Mexico, where the LPG is weighed and sold to Pemex. The Respondent and Universal are parties to a contract under which the Respondent agrees to transport LPG purchased by Universal from refineries in the United States to storage facilities located in Mexico. Those storage facilities are operated in Mexico by Transportadora Silza (Silza), a Mexican company. The contract between the Respondent and Universal also requires that the Respondent will obtain and maintain a fleet of tractors and trailers, specially designed to transport LPG. (GC Exhs. 27, 30, and 31.)

Silza operates solely in Mexico. It has offices and facilities in Tijuana and Mexicali, Baja, California, in Nogales, Sonora, and in Ciudad Juarez, Chihuahua. However, Silza owns all the stock of Texas Oil Manufacturing Industries, Inc. (Texas Oil), a Texas corporation. Silza and the Respondent are parties to a contract under which Texas Oil is named as the entity that agrees to lease to the Respondent a fleet of tractors and trailers and related equipment to transport LPG. The Respondent agrees to use these vehicles to transport LPG for shippers who wish to purchase LPG in the United States for sale to Pemex at facilities in Mexico operated by Silza. (GC Exh. 27.) A separate motor vehicle lease and service agreement has been executed between Texas Oil and the Respondent. (GC Exh. 29.)

Further, under the terms of the contract between the Respondent and Silza, the Respondent indicates its intent to use Silza's existing administrative staff in Mexico to review paperwork, make payments drawn on the Respondent's bank accounts to pay for fuel, oil, lubricants, tires, and other supplies and expenses necessary for the operation of the LPG fleet in Mexico. The Respondent appoints Silza as its "special limited disbursement agent" to review invoices and other charges, act as signatories on bank accounts, arrange to pay routine charges, to seek approval to pay extraordinary charges, and to maintain records, all in connection with the Respondent's business operation in Mexico. Pursuant to this contract, the Respondent agrees to indemnify Silza for any loses it incurs in connection with the services Silza performs on behalf of the Respondent. (GC Exh. 27.) Finally, under a separate contract, Silza agrees to directly lease to the Respondent six trailers. (GC Exh. 28.) The Respondent does not own any of the tractors or trailers, which it

[6] The parties strongly disagree as to whether the drivers' conduct in selling excess diesel fuel constituted theft (misappropriation). Counsel for the General Counsel contends that the Respondent tacitly condoned this conduct for years, as part of the drivers' compensation.

[7] By letter dated March 24, 2005, a representative of the Union withdrew the Union's objections to the results of the election, with the exception of Objection 4, 5, and 6. (CP Exh. 1; GC Exh. 1(t).)

[8] I take administrative notice that Pemex is a Mexican public entity, which has an agreement with the government of Mexico to sell gasoline and propane gas products to retail customers from its gasoline service stations located throughout the nation of Mexico.

uses in transporting LPG from the United States to Mexico, all of which are obtained either from Texas Oil or directly from Silza.

According to the testimony of Gardea,[9] during August 2004, the Respondent employed approximately 20 truckdrivers in Nogales,[10] and 14–15 drivers in El Paso. However, the parties stipulated specifically that as of August 30, 2004, there were 19 truckdrivers employed by the Respondent and based in Nogales in the bargaining unit found appropriate. They stipulated that the 19 Nogales-based drivers were as follows: Herbert Avila, Joe Bojorquez, Hector Gonzalez, Gilberto Nevarez, Robert Ryburn, Lemigao Sene, Luis Soto, Luis Davila, Rogelio Delgadillo, Victor Soto, Felipe Navarro, Bernardo Ramirez, Jesus Covarrubias, Jesus Valenzuela, Hector Lopez, Hector Manjarrez, Victor Cardiel, Jorge Curiel, and Juan Chacon. The complaint alleges that as of August 30, the Union represented a majority of the employees in the bargaining unit. Further, the parties stipulated that as of September 11, 2004, the 14 El Paso-based drivers employed by the Respondent were as follows: Alonso Alonso, Lorenzo Medina, Gonzalo Munoz, Efren Munoz, Jacinto Hernandez, Rosario Gastelum, Ramon Hernandez, Raul Almeraz, Jose Raul Almeraz, Roberto Sosa, Castulo Olivas, Manuel Gonzalez, Oscar Loya, and Manuel Urrutia. September 11, 2004, is a significant date as it was on that day that certain of the Respondent's El Paso-based employees ceased work concertedly and engaged in a strike.

C. Resolution of Disputed Facts

1. The nature of the relationship between the Respondent and Silza

During the course of the trial, much effort was expended and time spent by counsel for the General Counsel in an attempt to establish that the Respondent and Silza were either joint employers, or, at a minimum, engaged in a joint venture. In response to questions from me, counsel indicated that this effort was being made in order that certain alleged unlawful statements made by supervisory employees of Silza could be imputed to the Respondent. However, counsel for the General Counsel agreed with my assessment that the same goal might be accomplished with much less effort, assuming these alleged supervisors of Silza could be shown to be agents of the Respondent under the doctrine of "apparent authority." In any event, the General Counsel was given ample opportunity to try and establish the joint-employer/joint-venture relationship alleged in the complaint. Counsel for the Respondent denied any principal relationship between the Respondent and Silza, other than that of the delivery of propane gas by the Respondent for its customer, Universal, to Silza's facilities in Mexico. According to counsel for the Respondent, this was merely an arm's-length relationship.[11]

Despite counsel for the General Counsel's considerable efforts, the nature of the precise relationship between the Respondent and Silza remains, at best, "murky." I did not find Flores, who claims to be the owner of the Respondent, or Meraz,[12] the Respondent's accounting manager, to be particularly helpful or credible, regarding the relationship between these two entities. Especially for Flores,[13] I found his answers to counsel's questions to be vague, frequently made little sense, and often he was simply unable to recall the facts elicited.

Having reviewed the testimony of the Respondent's supervisors, that of employee witnesses, and the various agreements in effect between the Respondent, Silza, Texas Oil, and Universal, I am still uncertain as to exact nature of the relationship between the Respondent and Silza. I suspect that the relationship that the Respondent has with Silza is closer than a truly "arm's-length" relationship between two totally independent entities. Certainly, under the terms of the contract between the Respondent and Silza, the Respondent has in many respects designated Silza to act in the Respondent's behalf, when the Respondent is operating its business in Mexico. (GC Exh. 27.) However, my suspicions aside, the existing evidence is insufficient to make a finding that the Respondent and Silza are anything other than two separate business entities. Further, under these circumstances, I do not believe that it would be appropriate for me to draw an adverse inference based solely on the vague and less than credible way in which Flores and Meraz testified about the Respondent's relationship with Silza.

As I suggested to counsel for the General Counsel, her quest to establish a joint-employer/joint-venture relationship between the Respondent and Silza may have been an unnecessary effort. While I am not able to find that the Respondent and Silza are anything other than separate business entities, I do believe that the evidence demonstrates that for certain of Silza's supervisors or managers they exercised "apparent authority" as agents of the Respondent. I will discuss their agency relationship with the Respondent later in this decision.

2. The Union's majority status

It is the contention of the General Counsel, as set forth in complaint paragraph 5(b), that as of August 30, 2004, a majority of the employees in the Respondent's Nogales-based bargaining unit selected the Union as their collective-bargaining representative. The Respondent's answer denied this assertion, and at trial counsel for the General Counsel attempted to establish this alleged majority through the submission of signed union authorization cards. As mentioned above, the parties stipulated to the names of the 19 Nogales-based drivers who were in the bargaining unit as of August 30.

Based on their testimony at the hearing, as well as the introduction into evidence of their signed authorization cards, I find that the following 10 Nogales-based drivers, stipulated to be in the bargaining unit, signed union authorization cards on August 30, designating the Union to represent them for the purpose of

[9] The answer admits that Gardea is an agent and supervisor of the Respondent.

[10] Nogales, Arizona, and Nogales, Mexico are twin border cities. The reference to the Arizona City will simply be to "Nogales."

[11] Of course, Silza and its wholly owned subsidiary, Texas Oil, also lease tractors and trailers to the Respondent for the transportation of propane gas.

[12] The answer admits that Flores and Meraz are agents and supervisors of the Respondent.

[13] I am mindful of Flores' advanced age, 81. However, even considering the effects of the aging process on memory, I did not find his testimony in general to be credible.

collective-bargaining: Robert Ryburn, Rogelio Delgadillo, Joe Bojorquez, Jesus Covarrubias, Lemigao Sene, Luis Soto, Hector Manjarrez, Bernardo Ramirez, Hector Lopez, and Juan Chacon. (GC Exhs. 60–64, 66, 67, 69, and 73.)

Further, for the following five Nogales-based drivers, stipulated to be in the bargaining unit, I have reviewed the five union authorization cards purportedly signed by them, and compared the signatures on the authorization cards with the signatures of these employees appearing on Federal and State tax withholding forms in the possession of the Respondent: Jesus Valenzuela, Victoriano Cardiel, Hector Gonzalez, Victor Soto, and Luis Davila. (GC Exhs. 60, 64, 70, 74, and 75.) Also, I have considered the testimony, which I find to be credible, of drivers Robert Ryburn, Luis Soto, Hector Lopez, Lemigao Sene, and Rogelio Delgadillo, who witnessed Jesus Valenzuela, Victoriano Cardiel, Hector Gonzalez, Victor Soto, and Luis Davila signing their respective union authorization card on August 30. Based on a comparison of the signatures on the five authorization cards with the signatures on the five withholding forms, as well as the testimony of the witnesses, I find that the signatures on the authorization cards are authentic. Therefore, I conclude that Jesus Valenzuela, Victoriano Cardiel, Hector Gonzalez, Victor Soto, and Luis Davila signed union authorization cards on August 30, designating the Union to represent them for the purpose of collective bargaining.

Accordingly, based on the above, I conclude that of the 19 Nogales-based drivers stipulated to be in the bargaining unit on August 30, 15 signed union authorization cards as of that date.[14] As this is obviously more than 50 percent of the employees in the bargaining unit, I find that as of August 30, 2004, a majority of the bargaining unit designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent. By virtue of its majority status, the Union has been the exclusive collective-bargaining representative of the unit employees since August 30. The Respondent offered no rebutting evidence. Therefore, the General Counsel has established the allegations set forth in paragraphs 5(a), (b), and (c) of the complaint.

3. The alleged theft of diesel fuel

By counsel for the Respondent's own admission in his posthearing brief, there was a history of "corruption at California Gas." Joel Meraz testified that after he was hired by the Respondent as controller in September 2003, he discovered that the operations manager, Jesus Carrion, was engaged in corruption and embezzlement. Carrion falsified rental contracts for automobiles, airline trips, invoices, etc., and received kickbacks from drivers. Following Carrion's termination, Oscar Gardea[15] was hired in December 2003, as the new operations manager. Gardea works out of the Respondent's main office in El Paso, Texas. Gardea testified that he hires and fires drivers and directs their work. From the evidence presented, there is no doubt that Gardea manages and directs the daily operation of the Respondent.

According to his testimony, Gardea began to suspect that the Respondent's dispatcher in Nogales, Luis Garcia, was stealing diesel fuel. Garcia was fired in approximately May 2003, and replaced by Gabriel Velasco.[16] Gardea testified that he felt with the discharge of Garcia, any problems with the theft of diesel fuel were solved. This statement by Gardea is totally incredible because, as will become apparent below, if he thought diesel was not being "stolen" by other employees, he would have been the only employee of the Respondent to hold such a view.

I found much of Gardea's testimony to be incredible. It was frequently unrealistic, and at variance with the testimony of other witnesses. Specific examples will be given later in this decision. Further, I found Gardea to be very defensive, and he exhibited a degree of nervousness when testifying much greater than should have been expected from someone who, as an operations manager, supervises a large number of employees.[17] Also, especially when being cross-examined by counsel for the General Counsel, he was vague and appeared less than helpful. Because of both his demeanor when testifying, and the implausible nature of certain of that testimony, I conclude that Gardea was not a credible witness.

Virtually every truckdriver who testified, both former and current employees of the Respondent, indicated that they had previously sold unused diesel fuel from their trucks, and personally retained the money.[18] The drivers testified that the personal sale of diesel was a longstanding practice. Driver Rogelio Delgadillo testified that he had sold diesel since 1996, while driver Gonzalo Munoz testified that he had observed Respondent's drivers selling diesel as early as the 1980s. Not only was it a common practice for the drivers to sell diesel fuel, but this was done openly.

The Nogales drivers credibly testified that they sold diesel by the fuel pumps at the Nogales truckstop, in plain sight of dispatcher Velasco. The drivers were given a purchase order for diesel fuel from their respective dispatcher. At Nogales, that was Velasco. The amount of diesel to be purchased varied with the length of the route that was being driven. However, each driver determined for himself how much fuel was really needed to make the drive to the refinery and back. Apparently, this was almost always less than the amount, which had been allo-

[14] It should be noted that as of the following day, August 31, Felipe Navarro, also stipulated to be in the bargaining unit, signed a union authorization card. (GC Exh. 72.) Further, as of the next day, September 1, Gilberto Nevarez, also stipulated as being in the unit, signed an authorization card. (GC Exh. 65.) I make these findings based on Navarro's credible testimony, as well as the credible testimony of Robert Ryburn, who witnessed Nevarez signing his card, and by a comparison of the signature on the authorization card with the signature of Nevarez on a Federal tax withholding form. (GC Exh. 75.) I find the signatures on the authorization cards to be authentic.

[15] The answer admits that Gardea is an agent and supervisor of the Respondent.

[16] The answer admits that Velasco is an agent and supervisor of the Respondent.

[17] Prior to his employment with the Respondent, Gardea retired from a 20-year career with the U.S. military. At one time he had been an operations sergeant in the army at the battalion level, responsible for over 500 soldiers.

[18] Juan Chacon was the only driver who, when asked if he had sold diesel fuel, denied doing so.

cated on the purchase order. According to the Nogales-based drivers, they pumped the amount of fuel into their truck tanks that they needed to make their run, and then simply handed the fuel hose to a prearranged driver who was purchasing the diesel, for him to pump the remaining amount of diesel into his personal vehicle's tank.

According to the credible testimony of drivers Rogelio Delgadillo, Lemigao Sene, and Luis Soto, these purchases were conducted in the plain sight of Velasco, who stood approximately 4 or 5 feet away from the pumps. Velasco testified that he spent a lot of time at the fuel pumps at the Nogales truckstop, writing down the number of gallons of diesel that the drivers pumped. The Respondent's office in Nogales is at the truckstop. However, Velasco denied knowing anything about the drivers selling excess fuel. According to Velasco, "I did not see them stealing diesel." I find his denials incredible. They are totally implausible in light of the drivers' credible testimony that they sold the fuel openly with Velasco standing only 4 or 5 feet away. The drivers' testimony has "the ring of authenticity" to it, while Velasco's testimony certainly does not. The sale of the excess diesel was a common practice of long standing, which Velasco must have know about.

The El Paso-based drivers sold diesel on the Mexican side of the border, before crossing back into the United States. The driver's "customer" would simply use a siphon hose to suck the excess diesel out of the tank. Again, according to the testimony of El Paso-based drivers Alonso Alonso, Manuel Gonzalez, and others, this was done in plain sight of anyone driving on the highway from the U.S. to Mexico, including the Mexican police.

Further, both the Nogales and El Paso drivers credibly testified that their respective dispatchers had verbally either instructed them to sell the diesel or, at a minimum, consented to their doing so. For the Nogales operation that was Velasco, who driver Luis Soto credibly testified had told him and other drivers in approximately June 2003 that they should sell diesel fuel and use the money to eat. A number of drivers testified that they considered the money they made by selling diesel as their "meal money," to be used to purchase food when they were on the road driving a route.

For the El Paso operation, the Respondent did not have a dispatcher on the U.S. side of the border. Instead, Silza employee Jesus Acosta operating from the Silza facility in Juarez, Mexico functioned as the drivers' dispatcher and the person who issued purchase orders for the sale of diesel. Later in this decision, I will set forth at length the basis for my conclusion that Acosta is an agent of the Respondent. In any event, it is sufficient now simply to note that a number of El Paso-based drivers credibly testified that Acosta was aware that they were selling diesel. Driver Alonso Alonso testified that he started working for the Respondent in May 2002. He learned about selling excess diesel from the other El Paso-based drivers. According to his credible testimony, about 4 months later he asked Acosta, "[W]hat was going on with the diesel, with the sale of diesel?" Acosta replied that, "It was fine. . . . Everybody did it. . . . It was a part of the pay." Further, Acosta solicited a bribe from Alonso, telling him that if Alonso "wanted good trips . . . or if he wanted a rest on Sunday," he would have to pay Acosta something from the sale of the diesel. Acosta was the person who gave the El Paso-based drivers their trip assignments and dispatched them.[19]

It is clear from their testimony that the drivers felt that they had permission from the dispatchers to sell excess diesel. It is also clear that this practice had been going on for a long time. The drivers viewed the diesel sale as a means of supplementing their income, to use for the purchase of meals, to tip the Silza mechanics who sometimes repaired the trucks, or for any other purpose. The Respondent paid the drivers a set amount for each trip, depending on the length of the route. This was the Respondent's practice, regardless of how long a specific trip took. If the drivers were delayed at the International border in crossing, there was no additional money for the time spent waiting. This was one of the drivers' many complaints about their compensation and benefits.

While each driver's testimony was somewhat different, it appears that the drivers averaged between 4 and 6 roundtrips per week. The sale price of the excess diesel fuel varied over time, but on average it seems that the drivers sold a gallon of diesel for about $1 in U.S. currency. There were also disparities in the number of gallons sold; depending upon what excess was available either before of after a trip was taken. However, it would appear that drivers made anywhere from $40 to $100 plus in U.S. currency per week by selling the excess diesel.

A discussion of the sale of the excess diesel leads inevitably to the question of whether what the drivers did constituted a theft or "misappropriation" of that fuel. Of course, if the Respondent approved of such a sale, then what the drivers did was with permission and could not constitute theft. Unfortunately, as with much of this case, the issue is not simply "black and white." As noted above, I conclude that the sale of excess diesel was done with the consent and at least the tacit cooperation of the dispatchers for the Nogales-based and El Paso-based drivers. I am convinced that Velasco and Acosta knew what was going on, approved of it, and in the case of Acosta wanted to participate and have the drivers "cut him in on the action." Accordingly, I find that at least until July 2003, the drivers who sold excess diesel fuel did so as part of their approved compensation and were not engaged in the theft of the Respondent's fuel.

However, beginning in approximately July 2003, some efforts were made by the Respondent to eliminate the sale of diesel by the drivers. Gardea and Meraz apparently became concerned about the amount of money the Respondent was losing when excess diesel was sold. They initially tried to correct the problem by reducing the number of gallons of fuel that were allocated to the Nogales- and El Paso-based drivers to make their trips. This approach was unsatisfactory because the trucks began running out of fuel on the Mexican side of the border. This resulted in the trucks being impounded in Mexican inspection yards, which caused the Respondent to pay

[19] Acosta, the employee of a Mexican company, who works in Mexico, is presumably a Mexican national, and did not testify in this proceeding. I draw no adverse inference from the failure to testify, as, obviously, subpoena enforcement against a citizen of a foreign country residing abroad would not be feasible in these proceedings.

fines. The Respondent then increased the number of gallons, believing that it had miscalculated the amount of fuel the trucks needed.

Following this initial effort to control the diesel allocation, there was a period of approximately 1 year when the Respondent appeared to give "mixed signals" to the drivers as to whether they could continue with their sale of the excess fuel. At least two drivers, Ruben Leon and Jaime Palma, were suspended for 1 week during this period for the sale of excess diesel. However, Lorenzo Medina and Gonzalo Munoz, two El Paso-based drivers, credibly testified that in May 2004, in the presence of nine drivers in Acosta's office at the Silza facility in Juarez, Gardea indicated that while he was trying to get the drivers a $16 raise, in the meantime, they could continue selling the diesel fuel. I specifically do not credit Gardea's testimony that "every time [he] saw [the drivers]" during this period he told them that they better not be selling diesel.

In fact, it was not until July 2004, that the Respondent appeared to get serious about preventing the drivers from selling excess diesel. Nogales is the largest of the Respondent's three branches in terms of income and fuel used. El Paso is second and San Diego third. Beginning in Nogales on July 12–14, 2004, the Respondent attempted to control and prevent the sale of diesel by taping closed the diesel truck fuel tanks after they were filled. In this way, the Respondent could get an accurate account of the number of gallons used per trip. Gardea and Meraz went to Nogales for the specific purpose of taping the tanks. According to Gardea, he had planned to follow Nogales with taping the fuel tanks in El Paso during the first week of September 2004, but instead became preoccupied with other matters, principally a Department of Transportation audit. In any event, according to Rogelio Delgadillo, after the fuel tanks were taped and the specific amount of diesel per trip determined, the sale of fuel by the drivers in Nogales ended.

It is important to note that none of the discriminatees named in the complaint were discharged for "stealing diesel." Of the nine El Paso-based and two Nogales-based drivers terminated, the Respondent does not contend that any were discharged for stealing diesel. Never the less, an understanding of the history of the drivers' sale of diesel and of the Respondent's reaction to it is important as it places in context the events that led up to the discharges.

4. Alleged agents under apparent authority

It is the position of the General Counsel that three employees of Silza exercised apparent authority on behalf of the Respondent, and, therefore, were agents of the Respondent as defined in Section 2(13) of the Act. If correct, the conduct of these individuals can be imputed to the Respondent. The individuals in question are Jesus Acosta, Palemon Solorzano, and Juan Manuel Espinoza. The Respondent denies that these individuals functioned in any way as its agents, under an actual or apparent grant of authority. It denies any responsibility for the conduct of these individuals.

The Board has traditionally applied the common-law principle of "apparent authority" in determining whether persons are agents of a respondent. *Allegany Aggregates, Inc.,* 311 NLRB 1165 (1993). The test is whether "under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Waterbed World,* 286 NLRB 425, 426–427 (1987), quoting *Einhorn Enterprises,* 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988).

The General Counsel also alleges that Acosta, Solorzano, and Espinoza are employees of the Respondent and Silza, as well as supervisors of both entities. This is an alternate theory to the General Counsel's agency claim. The Respondent denies that any of these individuals have been in its employ. I conclude that there is simply insufficient evidence to determine whether the three men were employed by the Respondent, or for that matter even by Silza. However, to be found to be agents of the Respondent, it is not necessary for these individuals to be employees of the Respondent, or even of Silza. It is only necessary that the Respondent hold the individuals in question out as its agents.

As the Board has stated:

> Apparent authority will result from a manifestation by the employer to a third party, such as an employee, which creates a reasonable basis for the employee to believe that the employer authorized the action of the alleged agent. The determination is whether under the circumstances, the employee would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question.

United Scrap Metal, Inc., 344 NLRB No. 55 (2005), citing *Quality Mechanical Insulation,* 340 NLRB 798 (2003); *Pan-Olston Co.,* 336 NLRB 305 (2001).

An employer will be held responsible for the actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent had authority to act for him. *Electrical Workers Local 98 (MCF Services),* 342 NLRB No. 74 (2004), citing Restatement 2d, Agency, § 27. Of course, in the case before me, the question that remains is whether the Respondent cloaked Acosta, Solorzano, and Espinoza with apparent authority, so as to constitute them as its agents and, thereby, be bound by their statements.

Acosta, Solorzano, and Espinoza did not testify at the hearing. Therefore, most of the evidence regarding their interaction with the Respondent's drivers comes from the drivers' testimony, and is largely unrebutted. Acosta, who works at the Silza facility in Juarez, is apparently an employee of Silza and is employed in the capacity of a dispatcher. Regardless of whatever duties he performs for Silza, the evidence is clear that he functions as the Respondent's El Paso-based drivers' dispatcher. The drivers were unanimous in their testimony that Gardea does not involve himself to any appreciable degree in the day-to-day responsibility of assigning work to the drivers. That duty is left to Acosta. Gardea's testimony, to the extent that it is contrary, is outweighed by the testimony of the drivers, is inherently implausible, and plainly incredible.

The testimony of Alonso Alonso is typical of the testimony of the other El Paso-based drivers concerning the authority that Acosta exercises over them. According to Alonso, most of the time Acosta is the person who gives him a purchase order (p.o.) to buy a designated amount of diesel fuel, which p.o. Alonso is

given before he departs the Silza facility on his route to the refinery. Further, it is Acosta who assigns him his route, and the time by which he must return from the refinery with a fully loaded truck. On one occasion, Acosta reprimanded and suspended Alonso for returning late to the Silza facility. On another occasion, Acosta, following orders from Gardea, did not assign three consecutive trips to Alonso because he had failed to turn in Department of Transportation logs to Gardea.

Alonso has been required to ask Acosta for time off when he needs to take some time from work. Further, Acosta has attempted to "shake down" Alonso, telling Alonso that if he wants good routes and time off he will have to pay Acosta money from the sale of diesel fuel. Acosta's solicitation of this bribe was reported by Alonso to Gardea.

Alonso, along with most other El Paso-based drivers, has frequently complained to Acosta about pay, diesel fuel sale, safety, truck maintenance, and delays at the Mexican border. In these conversations, some of which were conducted in the presence of Gardea and Meraz, Acosta never indicated that these matters were none of his concern. In March 2004, after Alonso refused to take a truck back on the road until its brakes were fixed, Acosta suspended him for 5 days. During the same month, Acosta sent Alonso to Dallas, Texas, to pick up a new truck that the Respondent's drivers were going to use. Further, when driving his route, Alonso would have frequent occasion to talk by radio with Acosta about his progress with the load, expected time of arrival at Silza, and, if truck repairs were needed, whether such repairs would be made at the Silza facility.

As noted, the experiences that the other El Paso-based drivers have had with Acosta were similar to that of Alonso. The drivers usually only see Gardea a few to three or four times a month, when he is at the Silza facility in Juarez. In contrast, they see Acosta every time they are at Silza, to pick up a truck for the start of a route, or when dropping off their load at the end of a trip. Under examination by counsel for the General Counsel, even Gardea was forced to acknowledge that Acosta is his "eyes and ears" at the Silza facility in Juarez.

As established by the unrebutted evidence, the Respondent has bestowed upon Acosta, if not actual authority, then certainly apparent authority to act in the Respondent's behalf in regard to its El Paso-based drivers. It certainly was reasonable for the drivers to conclude that their employers' representative at the Silza facility in Juarez was Acosta. His actions, taken with the obvious consent, if not authorization, of the Respondent would reasonably result in the drivers' belief that Acosta spoke for the Respondent. *United Scrap Metal, Inc.*, supra; *Waterbed World*, supra. Accordingly, I conclude that during the time period in question, Acosta was an agent of the Respondent within the meaning of Section 2(13) of the Act.

Palemon Solorzano was something of a "mystery man." The El Paso-based drivers typically referred to him as "Mr. Palemon." It is clear that the drivers, who see him frequently at the Silza facility in Juarez, believe that he has some connection with both Silza and the Respondent. However, Gardea testified that Solorzano works for Universal, the Respondent's customer. According to Gardea, Solorzano is the "contact" from Universal, with whom Flores[20] deals. Following the testimony of Meraz, the status of Solorzano becomes even more confused. Meraz at first testified that he did not know for whom Solorzano worked, but then quickly corrected himself and said that Solorzano worked for Universal. Meraz admitted that he had previously signed an affidavit in which he indicated that Solorzano worked for Silza. He testified that he previously believed that because he had always seen Solorzano in Juarez at the Silza facility and simply assumed that Solorzano was a Silza employee. However, Meraz testified that he has since learned that Solorzano is employed by Universal.

Regardless of whether Solorzano actually worked for Silza, Universal, or some other entity, it appears to me that the El Paso-based drivers believed that he had some connection with the Respondent. Driver Alonso testified that in September 2004, he along with 12 other drivers brought certain complaints about their working conditions to "Mr. [Palemon],"[21] who Acosta had identified as "the Silza administrator." These complaints included safety issues with the trucks, salaries, the sale of diesel, and waiting time at the International border. In response to the drivers' complaints, Solorzano told them to be patient, and he would take the issues up with Gardea and Flores on their behalf. These, of course, were respectively the operations manager and president/owner of the Respondent. Several days later the drivers met again with Solorzano at the Silza facility. He was again the only "management" representative present. According to Alonso, regarding the drivers' complaints, Solorzano told them that he had been "scolded." Solorzano said that "his supervisors had told him not to be getting his nose into what didn't concern him, that he could no longer do anything for us." Alonso also testified that Solorzano mentioned his "supervisors" as being Gardea and Flores.

This was apparently not the only time that Solorzano was brought into the discussions about the Respondent's El Paso-based drivers' complaints. The Respondent's management brought Solorzano into its discussion with the drivers about controlling diesel sales in July 2004.[22] Meraz testified that the drivers were upset about losing the money from the sale of the diesel fuel and wanted to know what management would be giving them in return. Solorzano was invited to attend the meeting because the drivers claimed that some of the diesel was being stolen by Silza employees in Mexico. Solorzano was present so he could hear these claims and respond to them. Ultimately, Meraz determined that the diesel was not being stolen by Silza employees on the Mexican side of the border.

While not as clear as for Acosta, I am also of the belief that Solorzano's conduct served as a reasonable basis for the drivers to conclude that he was acting on behalf of the Respondent to resolve their grievances. Solorzano offered to bring their complaints to the attention of the Respondent's managers, Flores

[20] Flores is the president and self-professed owner of the Respondent.

[21] Initially, "Mr. Palemon" was mistakenly referred to by the witnesses as "Mr. Pantaleon."

[22] From Meraz' testimony, it is not entirely clear whether Solorzano was invited to attend a meeting for the Nogales-based or El Paso-based drivers. However, as Solorzano was located at the Silza facility in Juarez, I assume Meraz was referring to the El Paso-based drivers.

and Gardea, to determine whether the grievances could be redressed. Although he had returned to inform the drivers that the Respondent's management had told him to stay out of the matter, he continued to refer to Flores and Gardea as his supervisors. Further, management had, on its own initiative, brought Solorzano into the diesel sale dispute. Meraz admitted this. As such, the Respondent was suggesting to its drivers that Solorzano was a person of some importance with the Employer, who might be able to significantly influence a decision on their wages and working conditions.

The Respondent's managers should have understood that Solorzano's involvement in these matters, either by his own invitation or by that of Meraz, would reasonably create in the minds of its drivers the impression that Solorzano spoke on behalf of the Respondent. Certainly, nothing was done by the Respondent's managers to dispel such an impression among the drivers. Accordingly, the Respondent invested Solorzano with the apparent authority to act and speak on its behalf. See *Allegany Aggregates, Inc.*, supra; *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988); *Waterbed World*, supra. Therefore, I conclude that during the time period in question, Solorzano was an agent of the Respondent within the meaning of Section 2(13) of the Act.

Juan Manuel Espinoza (Espinoza) is another somewhat "mysterious" character. The evidence is fairly consistent that he is employed in some capacity at the Silza facility in Nogales, Mexico. Still, his precise duties, responsibilities, and employer remain uncertain. Gardea, who is based at the Respondent's El Paso facility, only visits the Respondent's Nogales facility occasionally, as the situation requires. As noted earlier, the Nogales-based drivers' immediate supervisor is the onsite dispatcher, Gabriel Velasco. It should be noted that the Silza facility in Nogales, Mexico has its own operations manager and dispatcher, Jose Aguirre. Silza is Aguirre's employer. It is Velasco, not Aguirre, who normally dispatches the Respondent's Nogales-based drivers. However, Gardea admitted that beginning in approximately May 2003, for a period of several months, at about the time that the Respondent hired Velasco, Aguirre did the dispatching and issuing of purchase orders for the Respondent's Nogales-based drivers.[23]

Gardea testified that Espinoza is a maintenance supervisor employed by Silza for both its Nogales and Juarez, Mexico facilities. According to Gardea, he has seen Espinoza at both facilities supervising employees in the maintenance shops. However, Gardea acknowledged that Espinoza never told him what his job was, and he simply assumed it based on the work he observed Espinoza performing.

In any event, the Respondent's Nogales-based drivers clearly were of the belief that Espinoza was in some way connected with the Respondent. Driver Robert Ryburn testified that one of his supervisors was "Mr. Espinoza on the Mexican side." Further, he characterized Espinoza as "Mr. Gardea's counterpart, operations management on the Mexican side."

According to Ryburn, he once spoke with Espinoza about a possible promotion. This conversation occurred in approximately January 2004. Ryburn had actually given the Respondent notice of his intent to resign. He testified that when he mentioned this to Espinoza, who was already aware of it, Espinoza asked him if he would be interested in a management position with the Respondent. Ryburn indicated some interest, and Espinoza told him he would raise the matter with the "higher ups." Several weeks later, Espinoza told Ryburn that he (Espinoza) had spoken with "his bosses" and an interview could be scheduled for Ryburn in El Paso. However, when Espinoza made it clear that the promotion would require that Ryburn relocate to El Paso, Ryburn indicated that he would not be willing to do so. Of course, it is the General Counsel's position that this conversation, which I believe was credibly testified to by Ryburn, establishes that Espinoza was held out by the Respondent as exercising managerial authority.

Nogales-based driver Joe Bojorquez testified about certain conversations that he had prior to the representation election. Bojorquez was still employed by the Respondent when he testified, which, considering that his testimony was somewhat adverse to the Respondent, is a strong indication of its veracity. According to Bojorquez, about 2 weeks prior to the election,[24] "Mr. Espinoza . . . one of the supervisors from down in Mexico," spoke to a number of the drivers "in small groups." Bojorquez testified that Espinoza told the drivers, "Just forget about the Union, that we were going to get like a $30 raise, or something like that. And, he was taking care of all of that."

Lemigao (Junior) Sene was a Nogales-based driver. When he testified on behalf of the General Counsel, he displayed significant hostility toward the Respondent. His attitude was particularly obvious when he was cross-examined by counsel for the Respondent. Under cross-examination he was combative and sarcastic, and it was necessary for me to admonish him. Because of his demeanor and attitude, I find him biased and somewhat incredible. Never the less, it is axiomatic that a witness may be incredible as to certain matters, and yet testify credibly as to others. I find this to be the situation for Sene, and credit his testimony, but only when it is inherently plausible and corroborated by other witnesses, or logically accurate when placed in context. Such is the case for Sene's testimony regarding Espinoza.

According to Sene, he was originally introduced to Espinoza by "Jose" the dispatcher in Mexico.[25] Jose told Sene that Espinoza was "the second man in charge of the company . . . one of the head men." Further, Sene testified that about 2 weeks before the union election, Espinoza approached seven or eight drivers while they were waiting at the Silza facility in Nogales, Mexico. Allegedly, Espinoza said that "[i]f [they] voted for the Union [they] weren't going to get a raise. But, if [they] voted against it, [they] were probably going to get $30 extra per load." On cross-examination, Sene admitted that he knew that Espinoza was employed by Silza.

[23] This was during approximately the same time period that Gardea fired Luis Garcia as the Nogales dispatcher and replaced him with Gabriel Velasco.

[24] The representation election in this matter was held on October 18, 2004.

[25] Presumably, this reference to "Jose" was to Jose Aguirre, the Silza dispatcher.

While the Respondent denies that Espinoza was its agent, either actual or apparent, or anything other than an employee of Silza, its managers must have know that they had a problem with Espinoza. Gardea testified that over the previous 2 years he had told the Nogales-based drivers that "Espinoza was not their supervisor." However, no driver testified that he was ever told any such thing by Gardea, and I find Gardea's claim highly self serving and not credible. Along the same line, Joel Meraz testified that the Respondent became concerned with what Espinoza was telling its employees after a charge was received from the Board dated December 27, 2004. The charge alleged that Espinoza had been soliciting employee grievances and promising improved wages, benefits, and working conditions if the employees withdrew their support for the Union. In response, the Respondent issued a document dated October 8, 2004, entitled "Memorandum," in both English and Spanish, which was given to the Nogales-based drivers, as well as posted on the bulletin board at the Respondent's Nogales facility. (GC Exh. 25, attachment exh. "8.") According to the memo, Espinoza was not an employee of the Respondent, was not authorized to make any promises to employees or to solicit grievances, and the Respondent disavowed any statements that Espinoza had made as they pertained to the drivers' terms and conditions of employment.[26]

Despite the Respondent's belated concern about whether Espinoza's statements might get the Respondent into trouble with the Board, I am convinced that the Respondent had for an extended period of time allowed Espinoza to represent himself as having some important connection with the Respondent. Espinoza had apparently contacted some of the Respondent's managers about a possible promotion for Ryburn. Also, several weeks prior to the election, Espinoza had approached Sene, Bojorquez, and other drivers, and offered them a $30-per-load raise, but only if they ceased supporting the Union. Overtime, he had repeatedly been referred to as a person who was important to the operation of the Silza facility, which the drivers would reasonably have assumed meant that he had influence with the Respondent.

Based on the above, I believe that the Respondent should have been aware that Espinoza was viewed by its Nogales-based drivers as a "conduit" for the transmission of information from the Employer to its employees. See *Cooper Hand Tools*, 328 NLRB 145 (1999); *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). The Respondent's disclaimer memo came too late to dispel the previous understanding of the drivers that Espinoza spoke for their employer.[27] Under these circumstances, the Nogales-based drivers would reasonably believe that Espinoza, with the apparent authority to speak on behalf of the Respondent, was authorized to make the statements in question. *Shen Lincoln-Mercury-Mitsubishi, Inc*, 321 NLRB 586, 593 (1996). Accordingly, I conclude that during the time period in question, Espinoza was an agent of the Respondent within the meaning of Section 2(13) of the Act.

[26] More will be said about this "Memorandum" later in this decision.

[27] The Respondent's disclaimer memo is a little like "closing the barn door, after the horse has escaped." The damage has already been done.

5. The events in El Paso

There were certain parallels between what the drivers based in El Paso were doing and what was happening with the Nogales-based drivers. All the drivers had the same set of general complaints with their wages, benefits, and working conditions. Principally these included the issue of diesel sale, salary compensation for the loss of the diesel sale, safety, truck maintenance, and waiting time at the International border. To a large extent, what happened in El Paso influenced what happened in Nogales, and vice versa. However, for ease and clarity of presentation, I will to some degree separately present the events which occurred in El Paso and Nogales.

Although the El Paso-based drivers had been complaining about these matters for some time, it was apparently the Respondent's increased interest in controlling the sale of diesel fuel that brought matters to a head. Driver Gonzalo Munoz credibly testified that in February 2004, at the request of the drivers, Gardea and Meraz meet with them at the Exxon truckstop in El Paso. The drivers discussed their desire for a raise, the need for improved truck maintenance, and the need to comply with the Department of Transportation regulations. The drivers asked specifically whether the Respondent intended to put a stop to the drivers' practice of selling excess diesel. Gardea and Munoz responded that they did intent to prohibit the sale of diesel, but would be replacing the drivers' lost income with a raise. The drivers indicated that this would be "wonderful," as they did not like having to sell diesel fuel to supplement their incomes, and a raise would be much better.

Drivers Gonzalo Munoz, Lorenzo Medina, and Alonso Alonso all credibly testified about a meeting which the El Paso drivers had around May 2004 with Gardea, Meraz, and Acosta in Acosta's office at the Silza facility. They again discussed truck maintenance, and the possibility of a raise, which Gardea had been talking about for some time. Gardea mentioned a possible $16-per-trip raise, but indicated that nothing was certain, and he was still working on it. According to Munoz' and Medina's testimony, Gardea told the drivers that until he had the details of a raise worked out, they should continue selling the excess diesel as they had been doing. The drivers then began to press Gardea about why a raise had not yet been approved, when it would be, and whether it could be for $20 per trip. At this point, Gardea apparent became angry and defensive. Alonso credibly testified that Gardea indicated that "if he wasn't given a raise, why would he give us a raise. And, that for those that were not happy, well, there was the door."[28] Following my observation of Gardea's testimony, I have no doubt that he made the statement attributed to him. It simply sounds like something that he would likely say, as he demonstrated a tendency to become confrontational when challenged.

In early September 2004, the El Paso-based drivers learned that the sale of excess diesel was definitely coming to an end. Driver Lorenzo Medina credibly testified about a meeting that a group of drivers had with Acosta in his office at the Silza facility. Acosta told them that Gardea had ordered that the drivers

[28] According to Alonso, Gardea made similar statements to groups of employees on four or five occasions, the most recent being in August or September 2004.

no longer be given purchase orders for fuel. Rather, the tanks would be filled at the truckstop and then sealed, so the drivers would not have access to the fuel. Shortly thereafter, a group of approximately 12 drivers met at the Silza facility with Palemon Solorzano, who the drivers considered to be an important manager of Silza and/or the Respondent. According to Alonso Alonso, the drivers complained to Solorzano about the diesel sale ending and the lost income not yet being replaced by a raise, poor truck maintenance, not being paid for waiting time at the border, and a change they objected to in the day of the week that they were paid. Most of these were problems of long standing. The drivers made it clear to Solorzano that they did not want to continue selling diesel, but, rather, they wanted a raise to compensate them for the lost income. In reply, Solórzano asked for time, and promised that he would talk with Gardea and Flores about redressing the drivers' complaints.

According to Alonso and Lorenso Medina, a day or 2 later Solorzano again met with the drivers at the Silza facility. Alonso testified that Solorzano said that he had been "scolded" by his supervisors and told "not to be getting his nose into what didn't concern him." He mentioned that the supervisors who scolded him were Gardea and Flores. Solorzano finally told the drivers that he could do nothing more for them.

It is undisputed that at some point a written petition from the drivers was produced. Alonso testified that driver Efren Munoz handed the petition to Solorzano at one of the meetings where the drivers voiced their complaints. Account Manager Joel Meraz testified that he received the petition from Munoz when Munoz was having a conversation with Solorzano. Ultimately, Meraz gave the petition to the Respondent's president, Ernesto Flores.[29] In any event, the petition apparently asked that the Respondent remedy the drivers' complaints including: the need for a raise in pay, compensation for the wait to cross the International border, repairs to be made on the trucks, safety concerns, changing the day pay was issued, and replacing Gardea as the Respondent's operations manager.[30] According to Meraz, the petition suggested that the drivers be given a raise amounting to 75 percent of the moneys the Respondent saved by controlling the allocation of diesel fuel, which was intended to prevent the drivers from selling excess fuel. Meraz disingenuously testified that the drivers never actually asked for a "raise" in the petition. In fact, it should have been obvious to Meraz and all of the Respondent's managers that the drivers were seeking money to offset the impending loss of income from the sale of diesel. Whatever name is placed on this request, the drivers were obviously asking for a raise.

On Saturday, September 11, 2004, nine of the El Paso-based drivers refused to work. The drivers apparently parked their trucks on the Mexican side of the border, where they would normally go at the start of the workday to pick up their route assignments and purchase orders from dispatcher Acosta at the Silza facility.[31] Driver Gonzalo Munoz testified that they decided to strike because the raise, which they had been promised as compensation for no longer being able to sell excess diesel fuel, had not been forthcoming. The nine strikers went to see Acosta and, according to Munoz, asked him to schedule a meeting with the Respondent's managers for Monday to determine "if we could reach an agreement." The drivers did not normally work on Sunday.[32]

The following workday, Monday, September, 13, 2004, the same nine drivers again refused to work. The strikers were as follows: Alonso Alonso, Lorenzo Medina, Gonzalo Munoz, Efren Munoz, Jacinto Hernandez, Rosario Gastelum, Ramon Hernandez, Raul Almeraz, and Jose Raul Almeraz. As they had requested the previous work day, a meeting was held with the Respondent's representatives including: Gardea, Meraz, and Adriana Flores, who is President Flores' granddaughter and was employed as an assistant to Meraz. This meeting was held in Acosta's office at the Silza facility in Juarez, where the trucks were parked.

According to Alonso, the drivers expressed their demands to Gardea. They told him they "wanted a raise . . . wanted some more attention paid to [them] . . . didn't want to be spending so much time in line." Of particular significance, the drivers told Gardea that they "did not want to sell the diesel. That [they] preferred a raise." Alonso testified that Joel Meraz responded to the drivers' demands, telling them that there would be no raise, "that everything was going to continue the same way."

Meraz testified that he responded to the items that had been contained in the petition previously presented by the drivers. He told them that the Respondent was unwilling to give them 75 percent of the moneys saved from the soon to be implemented controls on the diesel fuel allocation. He indicated that the Respondent was not going to give the drivers what they were not entitled to have, namely a portion of the savings resulting from controlling the allocation of diesel fuel. Regarding the complaint about uncompensated time spent waiting to cross the border, Meraz offered to enroll the drivers in the "Fast

[29] Meraz testified that Flores lost the petition, and, so, it was not produced at the hearing.

[30] Although the drivers had previously complained among themselves about the way Gardea performed his job, this was apparently the first time that they had formerly asked the Respondent to replace him.

[31] In his posthearing brief, counsel for the Respondent raises for the very first time a claim that by parking their trucks on the Mexican side of the border, the drivers had somehow "expropriated" the Respondent's property, and were engaged in conduct "akin to an in plant work stoppage." According to counsel, the striking drivers knew that the Respondent "did not have drivers available to remove those trucks back to the American side and be able to drive them." However, this argument was neither raised nor litigated at the hearing. Had the Respondent wished to raise such an argument, it should have done so affirmatively in its answer to the complaint, or at a minimum at the hearing. At this late date, the Respondent is precluded from raising such a defense. Further, there was absolutely no evidence offered at the hearing to support the argument that the Respondent is now raising. There was certainly no indication that in some way the Respondent's trucks were immobilized, disabled, or hidden, or that its managers or other drivers could not have simply crossed the border and driven the trucks away from where they were parked. The facts are certainly contrary to the suggestion counsel is making in his brief. According, I find this argument to be totally without merit.

[32] Prior to the work stoppage, a number of drivers asked permission to be off work for various reasons. Permission was given, and those drivers were not terminated.

Wait" program, which was a system utilizing background checks as a means of more quickly processing commercial vehicles at the border. In addition, Meraz indicated that the Respondent was considering paying a "bonus" to compensate the drivers for the waiting time at the border. Further, he told them that the Respondent would not be changing their payday, because it was not administratively convenient to do so. Finally, concerning the drivers complaints about truck maintenance, Meraz indicated that the Respondent was investigating other options for mechanical repairs on the vehicles, which hopefully would result in better maintenance.

According to Meraz, following his response to the petition, he informed the drivers that "[t]he company [can] not lose another day without transporting gas." He told them that he needed to know at that moment, "who wanted to continue, and who did not?" It is undisputed that the drivers asked for some time to go eat and to talk the matter over among themselves, and that they would give Meraz their answer when they returned. Alonso testified that the drivers went to a nearby restaurant, from where driver Gonzalo Munoz called one of the Nogales-based drivers and told him about the situation in El Paso. According to Alonzo, he overheard part of the conversation, during which the Nogales-based driver told Munoz that those drivers had contacted the Union, and the driver suggested to Munoz that the El Paso-based drivers do so as well. Following the phone call, the drivers decided that they would go back to work starting the following day, but that they would also try and speak with somebody from the Union.

After leaving the restaurant, the striking drivers returned to the Silza facility where they again met with the same managers. According to the credible testimony of Alonso, the drivers informed Meraz that they would be returning to work, but that they were going to be speaking with somebody from the Union.[33] This statement apparently upset Meraz. Alonso testified that Meraz handed out some "pieces of paper" upon which the drivers were to indicate whether they were returning to work or not. According to driver Munoz, Meraz ordered them back to work, and handed out "voluntary resignations" for those who would not be returning to work.

Meraz' version of these events is somewhat different. He contends that when the drivers returned from the restaurant, they told him that they could not give management an answer about returning to work until the following day. Meraz told them that it was not acceptable, as the Employer could not lose one more day of operation. He needed to know who wanted to keep working, and who did not. Meraz informed them that he would be passing around pieces of paper where they could confidentially indicate their individual decisions about whether they would be returning to work. However, the drivers all indicated that theirs was a group decision. Meraz repeated that he needed an answer that day, not the next, as the Employer was going to begin hiring other drivers.

I am of the view that the only material variance in the testimony of drivers Alonso and Munoz as compared with that of Meraz was the mention of the Union. I credit the testimony of the drivers. As I mentioned earlier, I did not find Meraz to be particularly credible. His testimony was often vague, artificial, and particularly self serving. On the other hand, I found Alonso and Munoz to be straight forward, candid, and natural. Their testimony about mentioning the Union was inherently plausible, and simply had the "ring of authenticity" to it. Accordingly, I believe that the Union was mentioned by the drivers during this meeting with the Respondent's supervisors.

Alonso testified that Meraz said, "Well, this is the way you guys wanted it." Meraz then handed something to driver Efren Munoz, which Meraz said was a "resignation letter," and asked who else wanted it. The letter was written in English, which Munoz could not read, and so Munoz asked Alonso, who is bilingual, to read it. Alonso read the letter and then told Munoz and the other drivers not to sign it, as it was a "voluntary resignation" letter. None of the nine strikers signed the letters, which Meraz had prepared, each with an individual strikers name on it.[34] The drivers left the letters in a pile on the table in Acosta's office, and they left the Silza facility. They gathered in a nearby park and decided to meet the next day at the Exxon truck stop in El Paso. Alonso testified that in the meantime, Gonzalo Munoz was going to try and contact someone from the Union.

Gardea testified that the first time that he learned that the Union was engaged in a campaign to organize the Nogales-based drivers was when a copy of the representation petition filed with the Board was faxed to Flores' office in El Paso. He placed this as occurring during the time of the work stoppage in El Paso/Juarez. Similarly, Meraz testified that he first learned of the union campaign when a copy of the petition was received in the Respondent's El Paso office in September. From the testimony of Gardea and Meraz, it appears that the Union's petition to represent the Nogales-based drivers was received at the Respondent's office in El Paso during the strike, likely on September 13. However, for reasons that I will explain later in this decision, I do not believe that this was the first time the Respondent's supervisors learned about the organizing campaign. The evidence supports a finding that the Respondent's supervisors learned about the Union's efforts in Nogales approximately 2 weeks earlier. This timing is significant, because I believe the Respondent's knowledge of its Nogales-based employees' union activity was one reason why it reacted as it did when the striking El Paso-based employees mentioned the Union on September 13.

The following morning, Tuesday, September 14, the nine strikers gathered at the Exxon truckstop in El Paso.[35] They discussed the situation, and Efren Munoz indicated that he had not yet been successful in contacting someone from the Union. From that location, Munoz called Meraz over the Employer's radio system, which permitted all the drivers to overhear the

[33] Driver Gonzalo Munoz also testified that during this conversation the drivers mentioned seeking support from the Union.

[34] The "resignation letters" are all dated September 13, 2004, with the subject listed as "Noncompliance of duties." Each letter is individually addressed to a striking driver and signed by Gardea. The letters indicate that the Employer is asking each named driver to resign for not complying with a trip assigned on that date. (GC Exhs. 21, 22, and 26.)

[35] They were joined by driver Manuel Gonzalez, who ultimately was not fired.

conversation on the radio speaker. According to Munoz and Alonso, Munoz told Meraz that the drivers were ready to go back to work, and to go to Juarez for the trucks. Meraz responded that they had all been "fired as of yesterday." Munoz asked why? To which Meraz responded, because the drivers "didn't pay attention" to what they had been told by Meraz the previous day. The conversation ended with Meraz saying that the drivers could pick up their belongings at the Respondent's office.

Three days later, Alonso went to the Silza facility in Juarez to get his belongings.[36] However, the guards prevented him from entering until Acosta indicated that he could do so. Alonso complained that some of his belongings were missing from the truck, to which Acosta replied that Gardea and Meraz had taken out certain items. Acosta then indicated that not all the drivers had been fired. Alonso asked Acosta if he knew specifically which drivers had been fired. Acosta did not, but he suggested that Alonso call the Respondent's office and ask. The following day Alonso called the office and spoke with "Monica."[37] He asked whether he was one of the drivers who had been fired. Monica responded in the affirmative.

As was noted above, it is undisputed that all nine of the El Paso-based drivers who engaged in the work stoppage on September 11 and 13, and who met with the Respondent's supervisors on September 13, were discharged. The other El Paso-based drivers, who did not strike, and who were absent from work with the permission of the Respondent, were not fired.

6. The events in Nogales

Many of the issues that the El Paso-based drivers complained about also concerned the Nogales-based drivers. These included safety, truck maintenance, waiting time at the border, the sale of diesel fuel, and salary. Especially vocal in discussing these issues among the drivers and in complaining to management were drivers Rogelio Delgadillo and Robert Ryburn. They were both experienced drivers. Delgadillo was employed by the Respondent on two separate occasions, from approximately 1996 until 2002, and then again from 2003 until his discharge on September 24, 2004. Ryburn, who had substantial training in transporting hazardous material (HAZMAT), and 12 years total as a truckdriver, was employed by the Respondent from September 2003 until his discharge on September 24, 2004.

One of the safety issues, which was of particular concern to the Nogales-based drivers, was the condition of the brake drums on trucks making trips through the mountain passes in the northern part of Arizona. Ryburn testified that he and other drivers would frequently discuss the "crystallizing" of the brakes created by a build up of a coating on the inside of the brake drums. According to Ryburn, the Employer would replace the brake pads, but not the brake drums, and so the problem persisted. A failure of the brake system on a mountain pass could be potentially fatal, and Ryburn testified that this issue was continually explained to Gardea and Velasco. Similarly, Delgadillo testified that problems with the brakes, as well as other safety concerns, were frequently discussed among the drivers and brought to the attention of management. Specifically, he mentioned informing Jose Aguirre, a Silza employee responsible for the maintenance of the Respondent's trucks on the Mexican side, and informing dispatcher Velasco on the U.S. side of the border.[38] In any event, both Ryburn and Delgadillo testified that safety concerns continued to occupy the attention of the Nogales-based drivers, as the problems, including defective brakes, were not corrected to the satisfaction of the drivers.

Delgadillo testified that other matters, which the drivers discussed among themselves, included wages, the lack of a raise, waiting time at the border, benefits, and the need for training. According to Delgadillo, these concerns were brought to the attention of management, in particular to Gardea and Velasco. He recalled discussing a wage increase with Gardea when Gardea responded that the drivers were already "making too much money." Velasco's standard response when hearing the drivers complaining about wages was that he "did not have nothing [sic] to do with that."

In approximately November 2003, Gardea and Velasco held a meeting attended by most of the Nogales-based drivers. During that meeting Ryburn challenged Gardea's claim that each driver had $1 million in life insurance provided by the Employer. In the presence of the other drivers, Ryburn disputed that claim, telling Gardea that he was confusing life insurance with liability insurance. In January 2004, Gardea and Velaso held another meeting for the Nogales-based drivers. At Gardea's invitation, this meeting was also attended by two of Silza's managers, Jose Aguirre and Coss. During that meeting, Delgadillo brought up the matter of the divers needing a raise because in the winter months, with the snow in northern Arizona, it took more time to make the round trip to the refineries. Gardea responded that he was "working on it." However, this response apparently upset the drivers, with driver Gilberto Nevarez calling him on it, saying that Gardea was always "working on it," but nothing ever happened. Ryburn testified that Gardea then told the drivers not to be "assholes."

The meeting continued to deteriorate, and Ryburn accused Gardea of mistreating another driver, Junior Sene. Next, Ryburn brought up a problem with the company issued radios not containing proper emergency telephone numbers for the Respondent's managers. Gardea challenged Ryburn's assertions and the two argued. Their disagreements continued when Gardea brought up the subject of the drivers signing monthly certifications that they had inspected their trucks. Ryburn

[36] It is unclear why Alonso went to the Silza facility, rather than the Respondent's El Paso office.

[37] Monica's position is unknown.

[38] While a number of witnesses testified about truck maintenance, it was never entirely clear to the undersigned how a decision was made, and by whom, as to where a truck would be repaired. It appears that if a truck breaks down on the U.S. side of the border, it is repaired on this side, being towed to a repair facility. For fairly minor repairs, the Respondent maintains a small repair shop at "Flores Gas" in El Paso. When a truck has mechanical problems on the Mexican side, if the truck can be driven back to the U.S., it is repaired on this side of the border. However, if the truck can not be driven back to this side, then the repairs are made at one of the Silza facilities in Mexico, by Silza employees. Meraz testified that for repairs that Silza performs on the Respondent's trucks, Silza only charges the Respondent for parts, not for labor.

wanted to know if the drivers would receive training on how to perform these inspections. Gardea indicated no training would be offered, to which Ryburn responded that without training, he would not sign a certification that he had inspected his truck. Clearly, the meeting had not gone smoothly, and the following day Ryburn mentioned to Velasco that he was afraid he would get fired because of having spoken out at the meeting. Velasco acknowledged that the meeting had been "bad." At that time, Ryburn gave Velasco a 2-week letter of resignation, which he subsequently withdrew.[39]

The Nogales-based drivers continued to discuss their work-related problems among themselves, and at times they involved Silza's managers. Sometime in the later part of January 2004, a group of 8 to 10 drivers, including Delgadillo and Ryburn, complained to Silza Manager Coss at the Silza plant in Nogales, Mexico, about safety concerns and the matter of the order in which drivers were dispatched out of the Silza yard. According to Ryburn, Coss promised to take the drivers' concerns to the "main office in Juarez."

In July 2004, Gardea asked Ruben Olivas, a contractor who inspects hazardous material containers for the State of New Mexico, to conduct a safety meeting at the Nogales Truckstop for the Nogales-based drivers. This meeting did not go well. Drivers complained to Olivas that the Respondent punished drivers who "red-tagged," meaning keeping a truck off the road because it was unsafe to drive. Other drivers complained about the trucks not containing the required safety kits, and about faulty tank valves that were a hazard because they leaked propane-gas. According to Ryburn, Gardea cut the meeting short and returned the drivers to their trucks. Shortly after this meeting, from July 12–14, 2004, the Respondent's supervisors went to Nogales with the intention of ending the sale by the drivers of excess diesel fuel. As was noted earlier, after the gas tanks had been fully fueled, Gardea, Meraz, and Velasco taped the tanks shut. This process was designed to prevent the drivers from having access to the diesel, and to determine exactly how much fuel was needed to make the various round trips to the refineries.

According to Ryburn, around mid-August 2004, 13 or 14 drivers met at a restaurant in Nogales to discuss continued complaints with their wages and working conditions, and also the prospect that the El Paso-based drivers might strike. The restaurant was named the "Exquisito." Some of the drivers had been in contact with their colleagues in El Paso, and they had been informed that the El Paso-based drivers might engage in a work stoppage. Ryburn testified that the Nogales-based drivers discussed refusing any request the Respondent might make for them to drive to Juarez in order to substitute for the striking El Paso drivers. Further, they discussed their unresolved complaints about their employment, and a decision was made to contact the Union to see if representation would be helpful.

Following the meeting, Ryburn returned to the Respondent's office. Dispatcher Velasco told him that Gardea, and Palemon and Aguirre from "across on the other side," had called and asked why the drivers were having a meeting. Further, Velasco said that if the drivers were asking for more money, they should have invited him "as [he] would have given [them] some ideas." However, Ryburn denied that any meeting had been held. In any event, Ryburn contacted the Union, specifically speaking with union organizer Kathy Campbell. A meeting was scheduled with Campbell and the drivers for August 30.

Ryburn testified that a day or 2 after contacting Campbell, Velasco asked him at the fuel pumps whether he (Velasco) could join the Union. Ryburn feigned ignorance. However, later that evening, Velasco called Ryburn on the radio and told him that he "would really like to go into the Teamsters." Further, Velasco told Ryburn that he knew that "you guys are bringing the Union in." Ryburn continued to deny any knowledge of a union campaign, but he did tell Velasco that he would look into whether there was any union that Velasco could join. I credit Ryburn's story and conclude that the Respondent, through Velasco, first learned around the middle of August 2004, that certain Nogales-based drivers were trying to have the Union represent them. Velasco does not deny the substance of Ryburn's testimony. According to Velasco, he became aware of the union campaign in September and asked Ryburn and Delgadillo whether he could join the Union. He was told that he could not, because he was a dispatcher. The reason that he spoke specifically to Ryburn and Delgadillo was because he considered them "knowledgeable about the Union."

It is undisputed that on August 30, 2004, Campbell met with approximately 14 drivers at the Exquisito restaurant. She explained to them how the Union worked and how it could help them with their complaints about their wages and working conditions. Ryburn and Delgadillo translated for the mainly Spanish-speaking drivers. Campbell passed out union authorization cards and approximately 13 were signed in her presence. Additionally, later that day Ryburn gave out several authorization cards, which were subsequently signed and given back to him. As noted earlier, I conclude that as of August 30, a majority of the employees in the bargaining unit (15 out of 19 employees) had signed cards authorizing the Union to represent them for the purpose of collective bargaining.

Driver Felipe Navarro testified that prior to signing an authorization card, Velasco approached him and asked him what he thought about the Union. Navarro told Velasco that he didn't know much, and invited Velasco to explain it to him. Velasco told him that "things were getting bad, becoming difficult, and were going to get worse." Further, Navarro testified that Velasco told him that Navarro should think about whether to continue with the Union, because it may or may not be in his best interests to do so.[40]

The representation petition seeking to represent the Nogales-based drivers was filed by the Union with the Board on September 13. This was the second day of the work stoppage by the El Paso-based drivers. Ernesto Flores testified that after he received the petition and understood that an election would be held for the Nogales drivers, he instructed Meraz to speak with

[39] Ryburn withdrew his resignation following an offer to him from Juan Manuel Espinoza to apply for a position as a manager with the Respondent. This matter is described in detail above.

[40] The record reflects that Navarro signed a union authorization card on August 31, 2004. (G C Exh. 72.)

the drivers about the Union, "find out what the problem was and try to convince them to continue working."

Flores was concerned about keeping the Nogales-based drivers working because his El Paso-based drivers were striking. Drivers Hector Monjarrez, Hector Lopez, and Rogelio Delgadillo all credibly testified that dispatcher Velasco directed them to deliver propane to Juarez because he needed them to replace the striking drivers from El Paso. Although Velasco could not remember exactly when Gardea asked him to send Nogales drivers to deliver propane to Juarez, he thought the request to do so was "somewhere" around August or September 2004. In any event, Velasco testified that he asked the Nogales drivers to drive routes to Juarez. His testimony is corroborated by that of the drivers. It is clear that Velasco asked most of the Nogales-based drivers to carry propane to the Juarez refinery.

There is some disagreement among the various witnesses as to exactly when the Nogales-based drivers were asked to drive loads to the Silza facility in Juarez. However, it is clear from the sequence of events that this occurred at the time of strike by the El Paso-based drivers. This is simply logical based on the sequence of events and the statements of the various witnesses. Flores testified that he requested that the Nogales drivers carry propane-gas to Juarez, "[b]ecause the client needed [the] product on an emergency basis." It is obvious that the emergency was caused by the refusal of the El Paso drivers to work, meaning that no propane was being delivered to the Silza facility in Juarez on September 11 and 13.

During the period of the strike, there was communication between the two groups of drivers. Rogelio Delgadillo testified that he heard from El Paso-based driver Gonzalo Munoz when those drivers went on strike, and then again after the strikers were fired. According to Delgadillo, he was also informed by dispatcher Velasco that drivers were needed to "help in El Paso," because the Employer had "fired all the other drivers." Velasco's efforts to induce Nogales drivers to carry loads of propane to Juarez including telling certain of the drivers that if they refused, they might be terminated. However, all the Nogales-based drivers refused to go to El Paso/Juarez. It is the position of the Respondent that the Nogales drivers refused to drive to El Paso/Juarez because drivers Delgadillo and Ryburn threatened that any Nogales drivers who did so would be harmed. Delgadillo and Ryburn deny making such threats. This issue will be discussed in detail later in this decision. In any event, both Delgadillo and Ryburn were discharged by the Respondent on September 24, allegedly for threatening other drivers.

Shortly after the work stoppage in El Paso, the Nogales drivers decided to "go public" with their organizing efforts. According to Ryburn, he was directed to do so by union organizer Kathy Campbell, who immediately sent him union paraphernalia, such as union key chains, pens, bumper stickers, and pins. Ryburn went to the Respondent's office, where he openly handed the materials out to those Nogales-based drivers who expressed an interest. According to Ryburn, Velasco was present in the office at the time. Velasco even asked for a union key chain. Ryburn testified that Velasco "kind of giggled and laughed," and he said, "You know, it's never going to happen. They won't allow it." Ryburn responded by saying that they would see what happens. According to Ryburn, after the drivers went public with the campaign, Velasco would on a daily basis ask him questions about the Union. Such questions included, "How does the Union work? . . . . What benefits? . . . . What can the Union do for you?" Ryburn testified that he personally consistently wore a union pin until he was terminated. In the case of Delgadillo, he placed a union bumper sticker on the dashboard of his personal vehicle, which he customarily parked in front of the Respondent's Nogales office.

As noted above, on September 24, Gardea went to Nogales and fired Ryburn and Delgadillo. The termination letters read in part that the Respondent had discovered that each man was "responsible for inciting the drivers into not complying with the company's operational needs." Further, the letters alleged that the Respondent had "received several complaints from other drivers of threats being made by [Ryburn and Delgadillo]." (GC Exh. 4.)

When notified by Gardea that he was being fired, Ryburn denied that he had threatened anyone and insisted that the termination letter was untrue. Gardea then said that he was just the messenger. Ryburn responded that "[t]hey usually kill the messenger." According to Ryburn, he chuckled and Gardea said, "What, I'm not afraid of you." Ryburn testified that he turned to Velasco and said, "That's just a saying." Velasco allegedly agreed saying, "Yeah, it's just a saying." However, Gardea's reaction was different. He testified that he took the comment about shooting the messenger very seriously, and would have terminated Ryburn for making such a comment, if Ryburn had not already been terminated. Velasco testified essentially that he did not consider the comment by Ryburn to be humorous.

According to Delgadillo, Gardea said that he had not expected Delgadillo's name to surface in the investigation, but as it had, he needed to fire Delgadillo. Delgadillo responded by saying that as there was nothing he (Delgadillo) could do, he would simply leave, which he did.

As I indicated earlier, I did not find driver Lemigao Sene entirely credible. However, I do believe his testimony that one week after Ryburn and Delgadillo were terminated, he had a conversation about their terminations with Nogales-based dispatcher Gabriel Velasco. According to Sene, Velasco told him that Ryburn and Delgadillo were fired because "they were troublemakers, and they were instigators, and that they were trying to form a union." Velasco testified that both Ryburn and Delgadillo were good drivers, and that he was not involved in the decision to terminate them. He denied ever discussing with Sene the reasons for their terminations. As noted above, I also found Velasco less than credible. In any event, when placed in context, I believe that Sene's version of this event is more probably credible than not. Velasco seemed to me to be something of a "loose cannon," likely to say whatever occurred to him without much forethought. As he apparently was not consulted before Ryburn and Delgadillo were fired, I get the sense that he answering Sene's question directly, and had no qualms about candidly expressing his understanding that the drivers were fired because of their union and other concerted activity.

Following their terminations, Ryburn and Delgadillo considered applying for employment with Coastal Transport

(Coastal), one of the Respondent's competitors. In early October, from a phone in Ryburn's truck, they called Wendy Thompson, the coastal manager in Gallup, New Mexico. They spoke to Thompson, explaining their experience and that they were looking for work. According to the testimony of both Ryburn and Delgadillo, Thompson expressed an interest in hiring them for the Nogales, Mexico to Gallup route, and she asked them to pick up applications from her Tucson office and send them to her. After picking up the applications and beginning to fill them out, the two men thought about a potential problem. At the time Coastal did not have an office in Nogales, Arizona, but Coastal and the Respondent had an arrangement pursuant to which Coastal drivers picked up customs' documents at the Respondent's office in Nogales, Arizona. Coastal drivers had no option but to stop at the Respondent's Nogales office for those documents, before attempting to cross the international border on their way to the Silza facility in Nogales, Mexico. Ryburn and Delgadillo were concerned that because of their discharges and Gardea's animosity toward them, Gardea might not want them at the Respondent's Nogales office picking up customs' documents. They decided to call Thompson back and explain to her the circumstances of their discharges.

According to Ryburn, he and Delgadillo called Thompson back and began to explain their belief that they had been fired because of their union activity. However, she interrupted them to say that she had just spoken with Gardea, and he did not want them at the Respondent's Nogales office. Ryburn testified that he told Thompson that what Gardea was doing was a "pretty messed up thing," and that she agreed with his assessment. Thompson allegedly mentioned some other routes that she could place the men on, but they told her that they were not interested in those routes. According to Ryburn, he and Delgadillo were not interested in those other routes because they paid less than the Nogales, Mexico to Gallup route. Gardea's testimony on this matter was in substantial agreement with Ryburn's testimony. He testified that in response to Thompson's question of whether he had any problem with Coastal hiring Ryburn and Delgadillo, Gardea responded that he had no problem with the two men working for Coastal, but that he did not want them in the Respondent's office in Nogales and "did not want them near California Gas drivers." Neither Ryburn nor Delgadillo formally submitted an application to work for Coastal.[41]

7. The Respondent's preelection conduct

The representation petition was filed by the Union on September 13, and the election in Nogales was held on October 18, 2004. Meraz testified that during that 5-week period, he held six or seven group meetings with two to four drivers per group to try and convince them not to support the Union. He undertook this campaign at the direction of the Respondent's president, Ernesto Flores. According to Meraz, he told the drivers that he was there to inform them as to why they should not vote for the Union. He spent time talking to the drivers about the Union, including alleged corruption and problems that other transportation companies encountered after the Union became the representative of those employees. Meraz testified that he told the drivers he could make them no promises, nor would he threaten them, or spy upon them. He used a prepared, written speech, after which he would answer questions. Meraz apparently made three separate trips to Nogales for the purpose of putting on these presentations.

Under examination by counsel for the General Counsel, Meraz admitted that he told the Nogales-based drivers that "everything was on hold because of the election." The drivers kept asking whether they would get any improvements in their wages and working conditions after the election. Meraz told them he could make no promises. However, the drivers were aware that a 10-percent bonus had recently been awarded to the drivers based in San Diego and those based in El Paso. Meraz testified that without directly commenting on the bonus, he told the Nogales drivers that "what happened in Tijuana [San Diego], happened in Juarez [El Paso].[42] However, I am of the opinion that Meraz testified disingenuously when he claimed that he did not suggest to employees that a defeat for the Union would mean inclusion for the Nogales-based drivers in the new 10-percent bonus payment. That was precisely what he was implying when he mentioned that both San Diego and El Paso drivers were now getting the bonus. That was the impression that he wanted to leave with the drivers and, as can be seen from the testimony of driver Hector Lopez, that was exactly how the drivers understood the comment. Such an understanding was certainly reasonable under the circumstances, considering Meraz' comments.

Another subject brought up by Meraz was the past history of the Union's involvement in strikes. He specifically mentioned the UPS strike and the fact that the company lost 5 percent of it contracts after the Union struck. He then mentioned that it was uncertain what would happen if there was a strike at the Employer, since it had essentially only one customer, Universal. Further, he opined that Universal had the right to "withdraw" from its contract with the Respondent, if it were dissatisfied. On yet another subject, Meraz told the drivers that the Respondent had up to a year to negotiate with the Union. Driver Bojorquez testified that Meraz made that statement in conjunction with saying that the Employer had to be fair in negotiating with the Union, and that it could take time for the parties to agree on the terms of a contract.

As noted earlier, the election was held on October 18, 2004. Of the votes cast, 4 were cast for the Union, 8 were cast against the Union, and 3 ballots were challenged. The challenged ballots were not sufficient in number to affect the results of the election. Therefore, of the valid votes counted, a majority were not cast for the Union.

[41] Wendy Thompson did not testify at the hearing.

[42] I take administrative notice that Tijuana/San Diego, Juarez/El Paso, and Nogales, U.S./Nogales, Mexico each constitute a pair of twin border cities, and often the witnesses use the names of the twin border cities interchangeably.

D. Analysis and Conclusions

1. The alleged 8(a)(1) statements

a. Extra-territorial jurisdiction

The complaint alleges numerous instances of 8(a)(1) conduct committed by the Respondent's agents and supervisors in El Paso, Texas, Nogales, Arizona, Juarez, Mexico, and Nogales, Mexico. Before I discuss these allegations, I believe it is necessary to at least touch upon the issue of "extra-territorial" jurisdiction as some of this conduct occurred in Mexico, which is obviously a sovereign, foreign country. The parties have not raised this issue at either the trial or in their posthearing briefs. This is understandable, as the Respondent is an American company, and its employee drivers presumably citizens or legal residents of this country, employed primarily in the United States. Their duties require only brief visits to Mexico when they unload propane at the Silza facilities,[43] and in some cases receive purchase orders for diesel fuel, route assignments, and perhaps pick up their trucks. Certainly, the vast majority of the drives' work time is spent in the United States, driving to and from the U.S. based refineries. However, it is alleged in the complaint that certain of the Respondent's agents and supervisors made statements violating Section 8(a)(1) of the Act, while the drivers were engaged in their work duties at Silza in Mexico. Therefore, I feel it appropriate to raise this issue sua sponte, on my own.

There are a significant number of Board and court cases concerning the extent of the Board's extra-territorial jurisdiction. Many of these cases involve the longshore/merchant marine industry, or civilian employees working on U.S. military facilities located in foreign countries. For the most part, I do not find these cases helpful, as they are simply not on point with the matter before me. The facts in the case before me are somewhat unique in that while the employee drivers perform the great majority of their work in the United States, a regular part of those duties does require that they drive into and out of Mexico. The case that I believe is factually the closest to the matter at hand is *Asplundh Tree Expert Co.*, 336 NLRB 1106 (2001), vacated 365 F.3d 168 (3d Cir. 2004).

In *Asplundh*, the Board held that the employer, a domestic U.S. company, had violated the Act by threatening an employee with discharge and by discharging two employees because the employees, who were U.S. nationals on temporary assignment in Canada, had engaged in protected concerted activities while in Canada. The court of appeals reversed, holding that the "broad language" of the Act did not extend jurisdiction over unfair labor practices committed by a domestic employer against its domestic employees while those domestic employees were on a temporary, short term assignment in Canada. The court distinguished this case from an earlier Board case, *December 12, Inc.*, 273 NLRB 1 (1984), enfd. 772 F.2d 912 (9th Cir. 1985).

In the *December 12* case, the Board found that a domestic employee, working for a domestic employer, under supervision by a domestic supervisor while both were on a temporary assignment in a foreign nation, was unlawfully discharged because he engaged in protected concerted activity while in the foreign country. The court in *Asplundh* found as a significant distinguishing characteristic the fact that the supervisor in *December 12* did not actually fire the employee until both were back in the United States.

As will be apparent below, I have found that the Respondent's agents and supervisors committed a number of unfair labor practices, some of which occurred while the employee drivers were located in Mexico performing their job duties. The Section 7 activity engaged in by the Nogales-based and El Paso-based drivers, both union and concerted activity, occurred in both the U.S. and Mexico. However, the result of that Section 7 activity would be felt primarily on the U.S. side of the border, as it was intended to have a beneficial effect on the wages, hours, and working conditions imposed upon the drivers, who were U.S. nationals or residents. The Section 7 activity engaged in on the Mexican side of the border was merely "incidental" to the drivers' object of improving the terms and conditions of their employment as established by their employer, the Respondent, a U.S. domestic company.

Similarly, the unfair labor practices committed on the Mexican side of the border were merely "incidental" to the Respondent's overall campaign, which, by means of interference, restraint, and coercion, sought to chill its employees' willingness to engage in Section 7 activity. If successful, the Respondent's campaign would ultimately deprive its U.S. nationals of their rights under the laws of the United States (the Act), to engage in union and concerted activity on this side of the International border. While the unfair labor practices committed by the Respondent in Mexico were only a small part of the Respondent's overall unlawful campaign, the Respondent should not be permitted to escape responsibility for its actions simply because they occurred a short distance south of the International border. The Respondent's overall campaign to frustrate its employees' union and other concerted activities can not simply be bifurcated into those unfair labor practices committed on each side of the border.

In my view, this case should really not be viewed as an exercise in extra-territorial jurisdiction by the Board. For the most part, this is an issue of domestic involvement. Most of the principal characters, including the Respondent, its highest ranking officials, and its drivers, are U.S. domestics, and the bulk of the unfair labor practices, including all the discharges, were committed on this side of the border. Those unfair labor practices committed in Mexico by either nondomestics or U.S. nationals briefly in Mexico do not change the overall composition of the case. Thus, I believe that the Board should exercise jurisdiction over even those unfair labor practices committed in Mexico. I conclude that the *December 12* case and the Board decision in *Asplundh*[44] support that position.

[43] The Silza facilities in Nogales and Juarez, Mexico, are both located in close proximity to the U.S. border.

[44] Obviously, I am aware that as the court of appeals vacated the Board's decision in *Asplundh*, the Board's holding in that case no longer constitutes binding legal precedent. However, the facts in the case before me are somewhat different, presenting, I believe, an even stronger basis for the assertion of jurisdiction by the Board.

b. The alleged statements of Gabriel Velasco

Complaint paragraphs 6(a) and (b) and their subparagraphs allege various unlawful conduct on the part of Gabriel Velasco. As noted earlier, Velasco was the Respondent's dispatcher located at the Respondent's office in Nogales, Arizona, and an admitted supervisor and agent of the Respondent. In counsel for the General Counsel's posthearing brief, she indicates her position that Velasco interrogated, threatened, and created the impression of surveillance of Nogales-based drivers Felipe Navarro, Rogelio Delgadillo, and Robert Ryburn.[45]

I have previously determined that prior to signing an authorization card, Navarro was approached at work by Velasco.[46] As the cards were signed beginning on August 30, and as Navarro signed his union authorization card on August 31, this conversation between Navarro and Velasco must have occurred on either August 30 or 31.[47] I conclude that Navarro credibly testified that Velasco asked him what he thought about the Union. Navarro responded that he didn't know much, and invited Velasco to explain it to him. Velasco told him that "things were getting bad, difficult, and were going to get worse." Further, Velasco told Navarro that he should think about whether to continue with the Union, because it may not be in his best interests to do so.

Traditionally, the Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. Under these factors, Velasco's questioning of Navarro about what he thought of the Union constituted unlawful interrogation. Velasco was Navarro's dispatcher and immediate supervisor, and there was no evidence that Navarro was at the time of the questioning an open union supporter. He had not yet signed an authorization card, and the questioning seemed designed to determine Navarro's sentiments about the Union. Navarro was apparently concerned about the question, responding with a less than candid assertion that he "didn't know much," and in turn asking Velasco what he knew. Navarro's concerns were reasonable.

Not only was the interrogation of Navarro by Velasco coercive, but it also would create an impression of surveillance in the mind of Navarro. The test for determining whether an employer has created an impression of surveillance is "whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored." *Sam's Club*, 342 NLRB No. 57, slip op. at 1 (2004). By his questioning of Navarro, Velasco was informing Navarro that the Respondent was aware of the union activities of the Nogales-based drivers. This was at a point in time several weeks before the organizers of the campaign "went public." The Act affords employees its protection to ensure that they are free to participate in concerted activities without the fear that members of management are peering over their shoulders. See *United Charter Service*, 306 NLRB 150 (1992); *Flexsteel Industries*, 311 NLRB 257 (1993). Velasco's questions were designed to alert Navarro that the Respondent was watching him, and reasonably would have had that effect. As such, the conduct was unlawful as it conveyed to Navarro the impression that his union activity was under surveillance.

Velasco was not content with merely interrogating Navarro, and he finished his conversation by predicting that "things were getting bad, becoming difficult, and were going to get worse." This was Velasco's way of saying that the union campaign would end badly for its supporters, and in effect constituted an illegal threat of unspecified reprisals. See, e.g., *American Wire Products*, 313 NLRB 989, 993 (1994); see also *Vemco Industries*, 330 NLRB 1133, 1133 (2000). As such, it was a violation of the Act.

As is set forth in considerable detail above, Rogelio Delgadillo and Robert Ryburn were active in organizing on behalf of the Union among their fellow Nogales-based drivers. At some point, Velasco must have realized they were actively involved, because he engaged both men in a series of conversations about the Union. Only a day or 2 after Ryburn first contacted union organizer Campbell, Velasco asked him at the fuel pumps at the truckstop in Nogales, Arizona whether he (Velasco) could join the Union. Ryburn feigned ignorance, but later that evening Velasco called him by radio, and asked again about joining the Union.[48] Velasco specifically said, "Hey, I would really like to go into the Teamsters. I know that you guys are bringing the Union in." Ryburn again feigned ignorance of any union campaign, but offered to find information about unions for Velasco.

Velasco testified that he asked both Ryburn and Delgadillo whether he could join the Union. Velasco placed the conversation with Delgadillo as occurring the night before he (Velasco) first spoke with Ryburn.[49] This would mean that the conversa-

[45] It would have been helpful had counsel for the General Counsel indicated in her brief which specific paragraphs in the complaint were allegedly supported by the testimony of which specific witnesses. Unfortunately, she did not do so, leaving it to me to make that determination based on a comparison of the complaint with the arguments she makes in her brief. Of course, ultimately a complaint allegation is successful only if supported by the evidence presented.

[46] In his testimony, Navarro does not specifically say where he was when he had this conversation with Velasco. Since both men reported to the Respondent's office in Nogales, Arizona, I believe it is logical to conclude that their conversation occurred at that location, and I so find. However, it is certainly possible that the conversation occurred at the Silza facility in Nogales, Mexico, where both men spent time working, or at some other location.

[47] See GC Exh. 72.

[48] That radio conversation occurred while both men were in Arizona. Ryburn was in Green Valley, but Velasco's specific location is unknown.

[49] While the location of the conversation between Velasco and Delgadillo is not specifically noted, I will again assume and find that it

tion occurred almost immediately after Campbell, the union organizer, was first contacted. According to Velasco, he approached Ryburn and Delgadillo because he considered them knowledgeable about the Union.

Velasco's conversations with Ryburn and Delgadillo occurred shortly after the organizing campaign began, at a time before the union supporters went public with their campaign. Velasco was the dispatcher and immediate supervisor of Ryburn and Delgadillo, and the conversations took place while all three men were working and relating to each other through their respective employment relationship. Further, Ryburn and Delgadillo were obviously concerned enough about Velasco's questions to answer him in a less than truthful way, denying any knowledge about a union campaign. Their concern was reasonable. Under these circumstances, I find that the questioning of Ryburn and Delgadillo constituted coercive interrogation and was violative of the Act. *Rossmore House,* supra; *Westwood Health Care Center,* supra.

Further, I conclude that the questions asked of Ryburn and Delgadillo by Velasco created the impression that their union activities were under surveillance. This inquiry occurred immediately after the start of the union campaign, before the campaign became public, and while it was still covert. The campaign was intended to be a secret, yet Velasco's questions, appearing to come "out of thin air," served to inform the organizers that the Respondent was aware of their plans. I am convinced that Velasco intended for his questions to have the effect of surprising Ryburn and Delgadillo with the news that their "secret" was in fact known to the Respondent. The ultimate intent of creating the impression of surveillance in this manner could only be to coerce employees to refrain from engaging in union activities. See *United Scrap Metal, Inc.,* 344 NLRB No 55, slip op. at 9–10 (2005),; *Ichikoh Mfg.,* 312 NLRB 1022, 1023 (1993); *United Electrical & Mechanical, Inc.,* 279 NLRB 208, 216 (1986). As such, Velasco's statements constituted a violation of the Act.

In summary, I find that on or about August 30 or 31, 2004, the Respondent, through Gabriel Velasco, unlawfully interrogated and threatened Felipe Navarro regarding his union activities, and caused him to believe that his union activities were under surveillance, all in violation of Section 8(a)(1) of the Act. Further, I conclude that on or about the same dates, the Respondent, through Velasco, unlawfully interrogated Rogelio Delgadillo and Robert Ryburn regarding their union activities, and caused them to believe that their union activities were under surveillance, in violation of Section 8(a)(1) of the Act. As such, counsel for the General Counsel has established by a preponderance of evidence the allegations set forth in complaint paragraphs 6(a) and (b) and their subparagraphs, and paragraph 9.

c. The alleged statements of Oscar Gardea

Complaint paragraph 6(c) alleges that on or about September 16, 2004, the Respondent, by Oscar Gardea, at the Silza facility in Juarez, Mexico, threatened its employees with unspecified reprisals because they engaged in union and other concerted activities. The support for this allegation comes from the testimony of El Paso-based driver Alonso Alonso. According to his testimony, in approximately May or June 2004, there was a meeting with 12 or 13 of the drivers in Jesus Acosta's office at the Silza facility in Juarez, where Gardea was questioned about whether the drivers would be getting a raise. Gardea responded that if he was not getting a raise, he would not give the drivers a raise. Allegedly, he then said that "for those that were not happy, well, there was the door." Alonso testified that Gardea made similar statements about "the door" four or five times at employee meetings after the drivers had complained to him about wages and working conditions. Alonso indicated that the most recent of these statements made to a group of drivers by Gardea occurred in August or September 2004 in Acosta's office.

In his posthearing brief, counsel for the Respondent does not specifically address these alleged statements by Gardea. Also, in Gardea's testimony he does not discuss whether or not he made such statements. I found Alonso to be generally credible, his testimony certainly seemed sincere, and it was inherently plausible. Frankly, the statement attributed to Gardea sounds like something he would say. As noted earlier, I found him to be very defensive, especially when criticized or challenged. It does not surprise me that when questioned by employees who were unhappy about their wages and working conditions, he defensively told them that if they were unhappy with the benefits provided by the Employer, "there was the door." Therefore, I believe that the statement attributed to Gardea by Alonso was made on four of five occasions, the most recent being in either August or September 2004.

As the complaint alleges a statement made by Gardea solely "on or about September 16, 2004," I will only address the most recent of Gardea's statements, which, according to Alonso, was made in August or September 2004. Whether made in August or September, the statement is close enough in time to the date alleged in the complaint for the Respondent to have been provided with due process notice and the opportunity to attempt to rebut the allegation.

Gardea's statement was made in response to what clearly constituted protected concerted activity on the part of the El Paso-based drivers. The drivers were concerned about the sale of diesel fuel, salary compensation for the loss of the diesel sale, maintenance and safety issues involving the trucks, and waiting time at the international border. These matters obviously constituted terms and conditions of employment, and as noted above, the drivers had been repeatedly acting in concert to bring these issues to the attention of management. As of August or September 2004, Gardea and the other managers were very familiar with the drivers' complaints, as they had been asked by the drivers on numerous occasions to address those complaints. It was in this context that Gardea responded essentially that if the drivers were unhappy with their wages and benefits that they could quit.

The Board has found such statements to constitute violations of the Act. Employees who engage in Section 7 activity, manifested by either union or protected concerted activity, must be free from threats by their employer directed at them because

---

occurred at the Respondent's office in Nogales, Arizona. This is most logical as both men regularly reported to and worked out of that office.

they engage in that activity. See, e.g., *West Virginia Steel Corp.*, 337 NLRB 34, 40 (2001) (finding a violation of the Act where the employer's president suggested that employees resign by telling them, "[I]f you didn't want to be on the team, you didn't need to be there"); see also *Venture Industries, Inc. (formerly Vemco)*, 330 NLRB 1133 (2000) (Board finds that statement to employees that the UAW means "you isn't working" constitutes an unlawful threat of job loss in violation of the Act). In the case before me, Gardea's statement was a clear directive to the drivers to stop complaining about wages and working conditions, or the result would be that something unpleasant would happen. Although he specifically mentions "the door," in essence, his statement was a threat of some unspecified reprisal.

Accordingly, I find that on or about September 16, 2004, the Respondent, by Oscar Gardea, at the Silza facility in Juarez, threatened its employees with unspecified reprisals because they engaged in protected concerted activities. As such, the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 6(c) and 9 of the complaint.

d. The alleged statement of Palemon Solorzano

Complaint paragraph 6(d) alleges that on or about September 16, 2004, the Respondent, by Palemon Solorzano, at the Silza facility in Juarez, Mexico, threatened its employees with unspecified reprisals because they engaged in union and other concerted activities. Earlier, I set forth in detail my conclusion that Solorzano was an agent of the Respondent, having invested Solorzano with the apparent authority to act and speak on its behalf. Driver Alonso credibly testified that in September, he along with 12 other drivers brought certain complaints about their working conditions to Solorzano's attention. In response to the drivers' complaints, Solorzano told them to be patient, and he would take the issues up with Gardea and Flores, who he identified as his supervisors. Several days later at the Silza facility in Juarez, Solorzano told the drivers that he had been "scolded" by his supervisors for "getting his nose into what didn't concern him," and that he was unable to do anything for them regarding their complaints. Solorzano did not testify, and no witness denied that the conversation occurred.

In her posthearing brief, counsel for the General Counsel contends that when Solorzano informed the drivers that he had gotten into trouble with his supervisors for discussing the employees' complaints with them and bringing those complaints to management's attention, that it served as a warning to the drivers not to further discuss these issues. According to counsel, this constituted unlawful restraint upon the employees' right to engage in Section 7 activity. However, I am of the view that the evidence concerning this incident is too ambiguous to warrant the finding of an unfair labor practice. Saying that he was "scolded" for "getting his nose into what didn't concern him" could have any number of logical meanings. Perhaps Solorzano was not normally involved with human resources, and this was just a reminder from his superiors to stay within his own area of expertise. While his statement to the drivers was probably a disappointment to them because they had hoped he could help them, I see no reasonable basis for them to have considered the statement as a warning that they should refrain from engaging in protected concerted activity. There is simply insufficient evidence to conclude that Solorzano's statement constituted a threat of unspecified reprisals in violation of the Act.

Therefore, based on the above, I recommend that complaint paragraph 6(d) be dismissed.

e. The alleged statements of Joel Meraz

It is alleged in complaint paragraphs 6(e)(1) and (2) that on or about September 20, 2004, the Respondent, by Joel Meraz, at the Silza facility in Juarez, Mexico, solicited its employees to resign their employment and threatened them with discharge, because they engaged in union and other concerted activities.

Earlier in this decision, I set forth in detail the events leading up to the strike by nine of the Respondent's El Paso-based drivers. As noted, the drivers commenced their work stoppage on Saturday, September 11, 2004. The following work day, Monday, September 13, they continued their strike, meeting twice with Meraz and other managers at the Silza facility in Juarez. The substance of these meetings was set forth above in detail and need not be repeated here. Suffice it to say, Meraz addressed the drivers' complaints about diesel sale, the need to replace it with additional compensation, wait time at the border, truck safety and maintenance, and changing the payday. However, management and the drivers remained far apart on these issues. Further, according to Meraz, he informed the drivers that "[t]he company [can] not lose another day without transporting gas." He told them that he needed to know at that moment, "who wanted to continue, and who did not?" The drivers then requested some time to go eat and talk the matter over among themselves, after which they would return and give Meraz their answer.

At a nearby restaurant, the striking drivers decided that they would return to work the following day, and that they would also try and speak with somebody from the Union. They returned to the Silza facility where, for the second time that day, the drivers met with the Respondent's managers. According to the credible testimony of driver Alonso, the drivers informed Meraz that they would be returning to work, but that they were also going to be speaking with somebody from the Union. This statement apparently upset Meraz. Alonso testified that Meraz handed out some "pieces of paper" upon which the drivers were to indicate whether they were returning to work or not. However, the drivers all indicated that theirs was a group decision. Meraz insisted that he needed an immediate answer, because the Employer could not lose 1 more day of operation, and was going to begin hiring other drivers.

Meraz was apparently further upset that none of the strikers would indicate in writing that they would be returning to work. Alonso testified that Meraz said, "Well, this is the way you guys wanted it." Meraz then handed something to driver Efren Munoz, which Meraz said was a "resignation letter," and asked who else wanted it. Alonso, who is bilingual, read the letter, which was written in English, and told Munoz and the other drivers not to sign it, as it was a "voluntary resignation" letter. None of the nine strikers signed the letters, which Meraz had prepared, each with an individual strikers name on it. The driv-

ers left the letters in a pile on the table in Acosta's office, and they exited the Silza facility.

Each letter is dated September 13, 2004, and is signed by Oscar Gardea. (GC Exhs. 21, 22, and 26.) The subject of the letter is listed as "Noncompliance of duties." Except for the respective name of the striker to whom it is addressed, the letters are identical, the text of which is as follows:

> Our company depends on every individual to do their work in a prompt and efficient manner. At this time you have decided not to comply with your job duties. You were sent on a trip on Monday, September 13, 2004 and have not complied with this order. At this time we request your resignation immediately and wish you the best in your future endeavors.

There is really very little dispute as to what transpired at the Silza facility on September 13. The nine drivers were engaged in the second day of a work stoppage protesting their wages, hours, and working conditions.[50] Meraz demanded an immediate answer in writing as to whether the drivers would be returning to work the following day. When they refused to provide him with such an assurance, he distributed letters requesting the strikers' immediate resignations.

It is axiomatic that striking employees are engaged in protected concerted activity. *Vic Tanny International, Inc.,* 232 NLRB 353 (1977) enfd. 662 F.2d 237 (6th Cir. 1980). By his actions, Meraz was soliciting the resignation of the striking employees. For all practical purposes, he was threatening the strikers with discharge for continuing their work stoppage. The Board finds such statements made to strikers or employees who contemplate striking to constitute unlawful threats. See, e.g., *Accurate Tool & Mfg., Inc.,* 335 NLRB 1096, 1096 (2001) (employer's statements to strikers that their walk out, or failure to return within 2 minutes, would be accepted as a resignation, constituted threats of discharge in violation of the Act); *Conair Corp.,* 261 NLRB 1189, 1189 (1982) (mailgram telling strikers that they would be "deemed to have voluntarily quit" unless they returned to work in 2 days was a threat of discharge in violation of the Act), enfd. in relevant part 721 F.2d 1355 (D.C. Cir. 1983), cert. denied sub nom. *Garment Workers Local 222 v. NLRB,* 467 U.S. 1241 (1984).

Accordingly, I find that on or about September 13, 2004, the Respondent, by Meraz, at the Silza facility in Juarez, solicited its employees to resign their employment with the Respondent and threatened its employees with discharge, because they engaged in union and other protected concerted activities. As such, the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 6(e)(1), (2), and 9.

Complaint paragraphs 6(g)(1), (2), (3), and (4) allege respectively that in or about late September or early October 2004, the Respondent, by Meraz, at the Respondent's Nogales facility made certain promises of benefits, threats of reprisals, and predictions of futility, all depending upon whether the employees supported the Union's organizing efforts. Earlier in this decision, I set forth in detail the preelection campaign conducted by Meraz among the Respondent's Nogales-based drivers. As noted, Meraz traveled to Nogales on three separate occasions for the purpose of giving campaign speeches to small groups of drivers. Meraz told the employees that he could make them no promises concerning what would happen to their wages and benefits after the representation election. He testified that specifically he said that "everything was on hold because of the election." Meraz resisted giving the drivers any specific information when they pressed him about improvements in wages and benefits, telling them that he could make no promises. However, the Nogales-based drivers were aware that recently a ten per cent bonus had been awarded to both the San Diego-based and El Paso-based drivers. When questioned about the possibility of such a bonus for Nogales, Meraz replied simply that "what happened in Tijuana [San Diego], happened in Juarez [El Paso]."

As I noted earlier in this decision, I found disingenuous Meraz' contention that his preelection speeches contained no promises or threats to the employees. On the one hand, he told the employees that there could be no changes to their terms and conditions of employment because, "everything was on hold" due to the pending election. On the other hand, he made it clear to the employees that in both El Paso and San Diego, where no representation elections were conducted, that the drivers had received a ten per cent bonus. The impression these statements would reasonably leave with the drivers was that if the Union were defeated in the election, the Nogales-based drivers would be receiving the same 10-percent bonus as the Employers' other drivers. I believe that this was precisely Meraz' intention when he made the statements, and, as can be seen from the testimony of driver Hector Lopez, this was exactly how the drivers understood the comments.

The Board has traditionally held that, "[d]uring an election campaign an employer's obligation is simply to maintain its existing practice and to act as if the Union were not on the scene." *United Electrical & Mechanical, Inc.,* 279 NLRB 208, 218 (1986); citing *McCormick Longmeadow Stone Co.,* 158 NLRB 1237, 1242 (1966); also see *ELC Electric, Inc.,* 344 NLRB No. 144 (2005) ("implicit promise" of improved benefits unlawful). Meraz told employees both that there could be no changes in their terms and conditions of employment until after the election, while at the same time implying that they would be getting a 10-percent bonus if the Union were defeated in the election. By Meraz' conduct, the "Respondent was coercively influencing the employees' freedom of choice, implying that the Union was responsible for the freeze." *United Electrical & Mechanical, Inc,* supra. At the same time, Meraz was promising the drivers a 10-percent bonus for rejecting the Union.[51]

[50] To the extent that the Respondent takes the position that this strike was unprotected because it allegedly involved a demand that drivers be permitted to continue "stealing" diesel fuel, this argument will be discussed at length later in this decision under the subject of the strikers' discharges.

[51] As counsel for the General Counsel noted in her posthearing brief, such a "carrot and stick" approach is not an unusual tactic. An employer who blames frozen wages on the union might logically imply that with a defeat for the union in the election, the freeze would be lifted. *United Electrical & Mechanical,* supra.

Accordingly, I conclude that Meraz' statements in September/October 2004 had the duel effect of promising the employees a wage increase if they rejected the Union as their collective-bargaining representative, and of threatening the employees with the loss of a wage increase if the Union were successful in the election. As such, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 6(g)(1), (2), and 9.[52]

It is alleged in complaint paragraph 6(g)(3) that in September/October 2004, the Respondent, by Meraz, at the Respondent's Nogales facility, threatened its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative. However, I am unaware of any evidence offered by the General Counsel in support of this allegation. In her posthearing brief, counsel for the General Counsel is silent as to this allegation. As counsel for the General Counsel has failed to meet her burden of proof regarding this allegation, I shall recommend dismissal of complaint paragraph 6(g)(3).

Complaint paragraph 6(g)(4) alleges that in September/October 2004, the Respondent, by Meraz, at its Nogales facility, told its employees that no matter the outcome of the representation election, the Respondent would continue to determine the terms and conditions of their employment, and, thus, conveyed to the employees the impression that it was futile for them to support the Union.

Earlier in this decision, I concluded that during his preelection meetings with the Nogales-based drivers, Meraz told them that if the Union won the election, the Respondent had "up to a year" to negotiate with the Union. Further, as driver Bojorquez credibly testified, Meraz in conjunction with his previous statement also indicated that the Respondent had to be "fair" in negotiating with the Union, and that "it could take time for the parties to agree on the terms of a contract." In my opinion, such comments by Meraz constituted an accurate statement of the potentially difficult nature of contract negotiations. Accurate statements of the law and the facts do not constitute implied threats. See, e.g., *Oxford Pickles*, 190 NLRB 109 (1971). Certainly, such statements did not amount to creating the impression that supporting the Union was futile.

In her posthearing brief, counsel for the General Counsel states that Meraz conveyed to the employees the idea that if the Union were chosen to represent the employees, the Respondent would continue to dictate the terms and conditions of their employment. However, I am unaware of any evidence that Meraz said or implied any such thing. Telling employees that it could take a long time to negotiate the terms of a contract, obviously an accurate statement, did not convey the impression that supporting the Union was futile, and did not rise to the level of an unfair labor practice.

Accordingly, counsel for the General Counsel has failed to meet her burden of proof regarding complaint paragraph 6(g)(4). As such, I shall recommend that this complaint allegation be dismissed.

f. The alleged statements of Jesus Acosta

Complaint paragraph 6(f) alleges that in or about late September 2004, the Respondent, by Jesus Acosta, at the Respondent's Silza facility in Juarez, Mexico, threatened its employees with discharge because they engaged in union and other concerted activities. I have already concluded, for the reasons discussed above, that Acosta was an agent of the Respondent, having been invested with the apparent authority to speak and act on behalf of the Respondent. Acosta was employed in Juarez, apparently by Silza, as a dispatcher.

As was discussed in detail earlier in this decision, on Tuesday, September 14, the nine strikers plus Manuel Gonzalez, who had been on approved leave the previous 2 workdays, gathered at the Exxon truckstop in El Paso. From that location, Efren Munoz called Meraz[53] over the Employer's radio system. Munoz told Meraz that the drivers were ready to go back to work, and to go to Juarez for the trucks. Meraz responded that they had all been "fired as of yesterday." Munoz asked why? To which Meraz responded, because the drivers "didn't pay attention" to what they had been told by Meraz the previous day. The conversation ended with Meraz saying that the drivers could pick up their belongings at the Respondent's office.

Three days later, Alonso went to the Silza facility in Juarez to get his belongings. While there he had a conversation with Jesus Acosta, during which Acosta indicated that not all the drivers had been fired. Alonso asked Acosta if he knew specifically which drivers had been fired. Acosta did not, but he suggested that Alonso call the Respondent's office and ask. Subsequently, Alonso called the Respondent's office in El Paso and learned from "Monica" that he had in fact been fired.

Driver Manuel Gonzalez did not strike the Respondent, but, rather, had been on approved leave during the 2 days of the strike. Although he initially thought that he had been fired along with the nine strikers, Gonzales subsequently learned from Oscar Gardea and Ernesto Flores at the Respondent's El Paso office that he was not fired. In any event, several days thereafter, he had a conversation with Acosta, presumably at

[52] As part of her post-hearing brief, counsel for the General Counsel filed a Motion to Amend the Complaint. By this motion, counsel seeks "to allege the granting of a raise to the non-striking El Paso drivers [as] an independent violation of Section 8(a)(1) and (3) of the Act." Following receipt of this motion, I issued an Order to Show Cause, after which the General Counsel filed an argument in support of her motion, while counsel for the Respondent filed a response in opposition to the motion. I am in substantial agreement with the arguments made by counsel for the Respondent. Principally, I do not believe that the issue of a raise made to the nonstriking El Paso drivers has been fully litigated. Despite some testimony from Joel Meraz on this subject, the Respondent had no notice of this allegation, and has had no opportunity to present evidence and arguments on the record concerning this allegation. Granting the motion would constitute a deprivation of due process and significantly prejudice the Respondent. See *Charles Batchelder Co.*, 250 NLRB 89 fn. 3 (1980); *Forsyth Electrical Co.*, 332 NLRB 801, 821 (2000). Accordingly, I hereby deny the General Counsel's Motion to Amend the Complaint contained in her posthearing brief. Also, I admit into evidence my Order to Show Cause, the General Counsel's argument in support of her motion, and the Respondent's response in opposition to the motion, respectively as GC Exhs. 76, 77, and 78.

[53] Presumably, Meraz was at the Respondent's office in El Paso at the time.

the Silza facility in Juarez. Gonzalez credibly testified that during that conversation Acosta told him that the nine drivers were all fired because "they were asking for money," they had demanded a raise. Further, according to Gonzalez, Acosta told him that it was Gardea who had given Acosta these reasons for terminating the drivers.

When Gonzalez testified, he was still employed by the Respondent, which certainly added credibility to testimony that was adverse to the interests of his employer. Also, as noted earlier, Acosta did not testify. No witness rebutted Gonzalez' testimony.

The combined testimony of Alonso and Gonzalez, as to their respective conversations with Acosta, established that Acosta indicated to Gonzalez that the nine El Paso-based strikers were terminated because they engaged in protected concerted activity. These comments by Acosta to Gonzalez constituted an independent 8(a)(1) violation of the Act. Such statements would certainly tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

Accordingly, I conclude that counsel for the General Counsel has met her evidentiary burden and established that in or about late September 2004, the Respondent, by Acosta, at the Silza facility, threatened its employees with discharge because they engaged in union and other concerted activities. As such, the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 6(f) and 9.

g. The alleged statements of Juan Manuel Espinosa

Complaint paragraphs 6(h) alleges that in or about early October 2004, the Respondent, by Juan Manuel Espinoza, at the Respondent's Nogales facility, promised employees a raise if they did not select the Union as their collective-bargaining representative. I have already concluded, for the reasons discussed above, that Espinoza was an agent of the Respondent, having been invested with the apparent authority to speak and act on behalf of the Respondent. As noted above, while he worked at the Silza facility in Nogales, Mexico, his precise duty and employer remains somewhat of a mystery. In any event, for the reasons stated earlier, the Respondent's Nogales-based drivers were of the belief that Espinoza was in some way connected with the Respondent. As driver Robert Ryburn testified, one of his supervisors was "Mr. Espinoza on the Mexican side." Espinoza did not testify at the hearing.

The support for this allegation comes from the testimony of two Nogales-based drivers, Lemigao "Junior" Sene, and Joe Bojorquez. However, both men contend that they had a conversation with Espinoza at the Silza facility in Nogales, Mexico, rather than at the Respondent's facility in Nogales, Arizona, as is alleged in the complaint. According to Bojorquez, about two weeks prior to the election, which was held on October 18, "Mr. Espinoza . . . one of the supervisors from down in Mexico," spoke to a number of the drivers "in small groups." Bojorquez testified that Espinoza told the drivers, "Just forget about the Union, that we were going to get like a $30 raise or something like that. And, he was taking care of all of that." Sene testified that he was first introduced to Espinoza by the Silza dispatcher, "Jose," who described Espinoza as "the second man in charge of the company . . . one of the head men." According to Sene, about 2 weeks before the union election, Espinoza approached seven or eight drivers while they were waiting at the Silza facility in Nogales, Mexico. Allegedly, Espinoza said that "[i]f [they] voted for the Union [they] weren't going to get a raise. But, if [they] voted against it, [they] were probably going to get $30 extra per load."

No witness rebutted the evidence that these statements were made by Espinoza. However, the Respondent denied that Espinoza was either its supervisor or agent. In any event, Meraz testified that the Respondent became concerned with what Espinoza was telling its employees after a charge was received from the Board dated December 27, 2004. The charge alleged that Espinoza had been soliciting employee grievances and promising improved wages, benefits, and working conditions if the employees withdrew their support for the Union. In response, the Respondent issued a document dated October 8, 2004, entitled "Memorandum," in both English and Spanish, which was given to the Nogales-based drivers, as well as posted on the bulletin board at the Employer's Nogales facility. According to the memo, Espinoza was not an employee of the Respondent, was not authorized to make any promises to employees or to solicit grievances, and the Respondent disavowed any statements that Espinoza had made as they pertained to the drivers' terms and conditions of employment. Finally, the memo set forth the rights that employees have under the Act, with a promise that the Respondent would do nothing to violate those rights. (GC Exh. 25, attachment exh. "8"; R. Exh. 6.) It is the position of the Respondent that this memo served to "cure" any alleged unfair labor practices committed by Espinoza.

Based on the evidence presented by Bojorquez and Sene, I conclude that Espinoza made the statements attributed to him, which offered employees a raise if the Union were defeated in the election. Further, I find that such statements would tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, and, therefore, constitute a violation of the Act. See *United Electrical & Mechanical,* supra.

In his posthearing brief, counsel for the Respondent cites *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978). However, the holding in that case is inapposite for the position counsel takes. In the *Passavant* case, the Board found a "purported disavowal ineffective to relieve Respondent of liability and to obviate the need for further remedial action." The Board cited to *Douglas Division,* 228 NLRB 1016 (1977), where it held that "[t]o be effective, such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." (Internal quotation marks omitted.) Also, in *Passavant* the Board cited to *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977), where it held regarding the repudiation that, "there must be adequate publication and there must be no prescribed conduct on the Employer's part after the publication."

In my view, the Respondent's "memo" falls far short of the repudiation standard set forth by the Board in the *Passavant* case. Espinoza's statements constituted just a small part of a wide pattern and practice of unfair labor practices committed by the Respondent's supervisors and agents toward its El Paso and Nogales drivers. As will be apparent through the remain-

der of this decision, I conclude that these were coordinated and deliberate efforts intended to thwart the protected Section 7 activities of the Respondent's employees, which constituted both union and other concerted activities. The memo in question, which concerns only Espinoza's conduct, is obviously ineffective to relieve the Respondent of liability for all the other many unfair labor practices committed by its supervisors and agents. It clearly does not obviate the need for other extensive remedial action. There is no logical basis for fragmenting the appropriate remedy in this case so as to consider the Respondent's memo as an effective disavowal of Espinoza's unlawful statements. The memo does not "cure" Espinoza's comments.

Accordingly, I conclude that counsel for the General Counsel has met her evidentiary burden and established that in or about early October 2004, the Respondent, by Espinoza, at the Silza facility in Juarez, Mexico, promised its employees that they would get a raise if they did not select the Union as their collective-bargaining representative. As such, the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 6(h) and 9 of the complaint.

It is alleged in complaint paragraph 6(i) that in or about mid-October 2004, the Respondent, by Espinoza, at its Nogales facility, threatened employees with a loss of employment if they selected the Union as their collective-bargaining representative. However, I am unaware of any evidence offered by the General Counsel in support of this allegation. In her post-hearing brief, counsel for the General Counsel is silent as to this allegation. As counsel for the General Counsel has failed to meet her burden of proof regarding this allegation, I shall recommend dismissal of complaint paragraph 6(i).

2. The alleged 8(3) conduct

a. The discharges of the El Paso-based drivers

It is undisputed that on Saturday, September 11 and Monday, September 13, 2004, nine of the Respondent's El Paso-based drivers engaged in a work stoppage. I believe that the facts establish that this work stoppage was in furtherance of a set of demands that the drivers had been making to the Respondent's management for months. These demands included increased salary, compensation for time spent waiting at the International border, repairs to be made on the trucks, and safety concerns. Contrary to the contention of the Respondent, these demands did not include the drivers' retention of the practice of selling excess diesel fuel. It was clear to the drivers by the time of the strike that the Respondent was ending that practice. However, while the drivers were not asking that the practice be continued, they were seeking additional salary to compensate them for the loss of the income previously received from their sale of diesel fuel. Meraz testified that the drivers were demanding to be compensated at the rate of 75 percent of the savings that the Respondent received through controls on the diesel allocation. The drivers' dispute that figure and while it is unclear exactly how much additional compensation the drivers were seeking, there is no question that some additional amount was being requested.

Counsel for the Respondent does not dispute that the drivers were engaged in a strike. However, he argues that such a strike was not protected conduct under Section 7 of the Act, because the object of the strike was unlawful, and, thus, the strike was unlawful and unprotected. Counsel contends that the object of the strike was to retain the ability to sell excess diesel fuel, which was allegedly nothing more than the theft of that diesel. As noted, the evidence does not support the contention that the drivers wished to retain the prior procedures on selling excess diesel. Even so, I should note that it is highly questionable whether the long standing practice of allowing the drivers to sell excess diesel constituted "theft." Earlier, in the factual section of this decision, I reported in detail on the various managers and supervisors who over a long period of time condoned the practice, and even encouraged the drivers to sell excess diesel as part of their overall compensation. This practice had occurred company wide, and in most instances was done in an open and obvious way. Such a practice was certainly not theft.

Ultimately and by increments the Respondent's new management changed the practice, and began to control the allocation of diesel fuel. These efforts have been fully discussed above in this decision. The drivers understood that times had changed, and the practice of selling excess diesel fuel was no longer being condoned by management. The drivers accepted the change, and most of them were happy with it. The old practice that necessitated their active participation in the sale of diesel was distasteful to many of them. However, what they wanted was some additional salary to compensate them for the loss of the diesel sale, which had constituted a significant portion of their income. It was this request for additional compensation, along with their other demands, that resulted in their decision to withhold their services from the Respondent.

As of September 11, the nine El Paso-based drivers were striking over their concerns related to wages, hours, and working conditions. They were obviously engaged in protected concerted activity in its most basic form. The Board has traditionally held that, "the spontaneous banding together of employees in the form of a work stoppage as a manifestation of their disagreement with their employer's conduct is clearly protected activity." *Vic Tanny International, Inc.*, 232 NLRB 353 (1977) enfd. 662 F.2d 237 (6th Cir. 1980), citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Further, it is beyond question that the striking drivers were acting in "concert," as they collectively took action in refusing to drive their trucks from the Silza facility in Juarez on their routes to the refineries in the U.S., and then back again to the Silza facility. *Meyers Industries*, 268 NLRB 493 (1984). This protected concerted activity continued on the following workday, September 13, as the drivers withheld their services, in an effort to force management to exceed to their demands.

Section 7 of the Act gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The right to strike, even without notice, is such a concerted activity. *Americorp,* 337 NLRB 657 (2002); *Bethany Medical Center,* 328 NLRB 1094 (1999), citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). It is a long established principle that an employer infringes on the Section 7 rights of its employees and violates Section 8(a)(1) of the Act when it discharges its employees for engaging in protected concerted activity in the form of a strike. While an employer may replace strikers, it may not terminate them because

of their protected activity. *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (9th Cir. 1969), cert. denied 397 U.S. 920 (1970). The Board has held that the unlawful discharge of strikers is a violation of the Act and "leads inexorably to the prolongation of a dispute." *Americorp,* supra at 660, citing *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982), enf. granted in part and denied in part, on other grounds 718, F.2d 269 (8th Cir. 1983).

The Respondent does not deny that it fired the nine strikers. Further, there is no claim that they were not terminated, but merely "replaced." The only defense offered by the Respondent at the trial was the claim that the "object" of the strike was unlawful, which claim I reject for the reasons stated directly above. However, in his posthearing brief, counsel for the Respondent raises for the very first time a claim that by parking their trucks on the Mexican side of the border, the drivers had somehow "expropriated" the Respondent's property, and were engaged in conduct "akin to an in plant work stoppage." For the reasons stated earlier in footnote 28 of this decision, I reject his argument as totally unsupported by the facts. Also, as I noted, this argument should have been raised affirmatively in the Respondent's answer to the complaint, or at a minimum at the hearing so that the matter could have been fully litigated. It was not, and at this late date, the Respondent is precluded from raising such a defense.

It should be noted that the complaint alleges the discharge of the strikers to constitute not only a violation of Section 8(a)(1) or the Act, but also of Section 8(a)(3). The El Paso-based strikers were not represented by the Union and were not actively engaged in an organizing campaign. While counsel for the General Counsel has not clearly articulated a theory for how the Respondent's discharge of the strikers was intended to discourage membership in a labor organization, I believe there is a connection. Based on the large number and nature of the Respondent's unfair labor practices, I am of the view that the Respondent was engaged in a coordinated and deliberate effort to deprive its drivers of their Section 7 rights in both Nogales and El Paso. These two locations can not be considered separately, as the Respondent's actions in both locations were interrelated.

The evidence establishes that the Respondent first became aware of the efforts of the Nogales-based drivers to organize on behalf of the Union in about mid-August 2004. From that point forward, Nogales dispatcher Velasco had a series of conversations with Nogales-based drivers Ryburn, Delgadillo, and others about the Union, its benefits, whether he himself could join the Union, and whether the campaign would be successful. The Respondent's knowledge of the organizing campaign was clear beginning approximately mid-August. The representation petition itself was received by the Respondent's managers in their office in El Paso during the strike, likely on September 13.

It was also on September 13 that the El Paso-based drivers, during their lunchtime meeting at a restaurant near the Silza facility in Juarez, decided to contact the Union to see whether they could obtain assistance. They did so after talking with a Nogales-based driver about the status of the union campaign at that location. After returning to the Silza facility from the restaurant, driver Alonso informed Meraz and the other managers that the drivers would be returning to work, but that they were going to be speaking with somebody from the Union. It appears that it was this statement that greatly upset Meraz, and resulted in his demand that if the strikers could not commit to immediately returning to work, that they sign resignation letters.

Thus, I believe that the evidence demonstrates that the nine El Paso strikers were terminated not only for striking, but also because they expressed an interest in contacting the Union. Being faced with an active organizing campaign at its Nogales facility, the Respondent's managers appeared to be in a panic to ensure that such a campaign did not take hold at its El Paso facility.

It should be noted that the actual terminations did not occur until Tuesday, September 14, 2004, when the drivers gathered at the Exxon truckstop in El Paso. It was from that location that driver Munoz called Meraz, presumably at his office in El Paso, over the Employer's radio system. Munoz informed Meraz that the striking drivers were ready to return to work, and to go to Juarez for the trucks. However, Meraz replied that they had all been "fired as of yesterday," because they "didn't pay attention" the previously day. Since this was the first time that the strikers were told unequivocally of their terminations, I am of the view that the discharges were not "official" until this date.[54]

Regarding the General Counsel's theory of the case that the El Paso-based drivers were fired for striking in violation of Section 8(a)(1) of the Act, the Respondent does not dispute that they were fired for striking. However, the Respondent argues that the strike was unprotected conduct because it was in support of an unlawful object, namely the interest in continuing the "theft" of diesel fuel, and/or because it involved the "expropriation" of the Respondent's trucks. In such circumstances, where there is essentially no dispute that the employees were engaged in a strike, and, therefore, were terminated, I believe that it is inappropriate to analyze the case under the "dual motivation" framework as set forth in *Wight Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Instead, the proper analytical framework is that found in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). In that case the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) of the Act by discharging or disciplining an employee based on its good faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. *La-Z-Boy Midwest,* 340 NLRB No. 35 (2003).

In the case before me, the nine El Paso drivers were terminated for striking. The evidence establishes that their conduct constituted concerted activity. For the reasons expressed above, the evidence does not show that the strike was for an unlawful object or that the strikers committed other misconduct by "expropriating" the Respondent's trucks. Since the strikers were not engaged in misconduct, their strike was protected by Section 7, and, therefore, their terminations for engaging in protected concerted activity were in violation of Section 8(a)(1) of the Act.

[54] It is significant to note that the nine terminations took place in the U.S., not in Mexico.

As noted, the General Counsel also alleges the terminations as violative of Section 8(a)(3) of the Act. This theory is apparently premised on the interest that the El Paso-based drivers had in contacting the Union for assistance in their dispute, and the Respondent's alleged animus toward the Union. As this theory takes the case into the "dual motivation" framework, and in the interest of thoroughness, I will also analyze this case under the *Wright Line* framework.

In *Wright Line*, supra, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB vs. Transportation Management Corp*., 462 U.S. 393 (1983).

The Board in *Tracker Marine, L.L.C*., 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co*., 303 NLRB 638, 649 (1991).

As I have indicated above, there is no doubt that in striking, the nine El Paso-based employees were engaged in protected concerted activity. They were also engaged in union activity when on September 13, at a restaurant in Juarez, near the Silza facility, they agreed among themselves to contact the Union and seek its assistance in their dispute with the Respondent. They came to this conclusion following a phone call between driver Munoz and a Nogales-based driver who recommended contacting the Union. Further, I credit drivers Alonso and Munoz and conclude that the El Paso drivers' union activity continued with the drivers informing Meraz and the other managers assembled at the Silza facility that while the drivers would be returning to work, they intended to contact the Union for help. Thereafter, efforts were made by Munoz to contact some union official, and the drivers discussed that effort among themselves.

Of course, it is obvious that the Respondent was aware of the El Paso-based drivers' concerted activity, as the strike was of immediate concern to the managers beginning on September 11 and continuing on September 13. Meraz repeatedly told the drivers that the Respondent could not lose another day of production, and he needed to know immediately who would be returning to work. The Respondent's managers were also very aware of the drivers' long standing complaints as the cause of the strike. Regarding union activity, as I have noted above, the Respondent, through dispatcher Velasco, learned of the Nogales-based drivers' union activity as early as mid-August. For the El Paso-based drivers, the Respondent learned of their interest in the Union when Meraz was informed on September 13 that the strikers would be returning to work, but would also be contacting the Union for assistance. Coincidentally, this was also the date the Respondent received a copy of the representation petition filed by the Union seeking to represent the Nogales drivers. The receipt of the petition made the statement by the El Paso drivers that they were going to be contacting the Union all the more significant to the Respondent's managers.

There is also no doubt that each of the nine strikers suffered an adverse employment action. They were all terminated by Meraz over the Respondent's radio system on the morning of September 14, following their unconditional offer to return to work.

Regarding the question of whether there exists a link or nexus between the El Paso-based drivers' union and other concerted activity and their terminations by the Respondent, I believe that the evidence strongly establishes such a connection. As I have already discussed in detail, the Respondent's supervisors and agents committed numerous unfair labor practices involving both the Nogales and El Paso drivers. I have concluded that this Employer was engaged in a coordinated and deliberate campaign to deprive its employees of their Section 7 rights. The Respondent was determined to defeat the Union's organizing campaign in Nogales, and to prevent the inception of such a campaign in El Paso, plus to prevent the strikers from exercising their right to engage in concerted activity. The actions of the Respondent at both locations were interrelated and cannot simply be viewed separately, as in a vacuum.

Earlier in this decision, I set forth in detail my conclusions regarding specific unfair labor practices committed by the Respondent's agents and supervisors. These included Gabriel Velasco interrogating employees, creating the impression of surveillance, and threatening employees with reprisals; Oscar Gardea threatening employees with reprisals; Joel Meraz soliciting employees to resign, threatening employees with discharge, making promises of benefit, and threatening employees with loss of wages; Jesus Acosta threatening employees with discharge; and Juan Manuel Espinoza making promises of benefit, all in order to discourage employees from supporting the Union or engaging in other protected concerted activity. Such conduct was in violation of Section 8(a)(1) of the Act, and beyond question establishes the Respondent's strong animus toward the Union and those of its employees who engaged in union and other protected concerted activity.

On September 13, the day prior to discharging the strikers, Meraz solicited their resignation from the Employer and threatened them with discharge, because they would not immediately agree to return to work. While he was clearly upset with the El Paso-based drivers for striking, what appeared to precipitate

these actions by Meraz was the mention by the strikers of contacting the Union. Such actions were a clear manifestation of the Respondents' hostility toward both the union activity of the El Paso-based drivers, and of their protected concerted activity in striking.

The General Counsel has established a strong link or nexus between the El Paso-based drivers' union and other protected concerted activity and the Respondent's decision to terminate them. Further, the timing of the terminations strongly suggests that it was a direct response to the employees' Section 7 activity. The drivers were terminated on the morning of September 14, immediately following their unconditional offer to return to work, and the day following their statement to the Respondent's managers that they were going to contact the Union. The Respondent's reaction was a clear message to all of its drivers companywide that the Respondent would not tolerate its employees engaging in union or other protected concerted activity.

As counsel for the General Counsel has met her burden of establishing that the Respondent's actions were motivated, at least in part, by animus toward the El Paso-based drivers' union and other protected concerted activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). The Respondent has failed to meet this burden.

As I have already said, the Respondent does not really deny terminating the drivers for striking. The most counsel for the Respondent suggests is that the strike was unprotected because of an alleged unlawful object, and/or because the drivers had "expropriated" the Respondents trucks. For the reasons stated earlier, I rejected the contention that the drivers were striking to continue the practice of selling excess diesel fuel. The facts do not support this argument. Further, as I explained in footnote 28 of this decision, the Respondent's failure to affirmatively allege an "expropriation" argument, and to have such a contention litigated at the trial, precludes the Respondent's counsel from raising this argument at this late date. In any event, the facts to not support this argument either. Regarding the claim that the El Paso drivers were discharged because of their union activity, the Respondent offers no additional defense, other than a general denial.

I find the Respondent's stated explanation for terminating the nine El Paso-based drivers to constitute a pretext. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of the drivers' union and other protected concerted activities. *Williams Contracting, Inc.*, 309 NLRB 433 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Shattuck Denn Mining Corp. v. NLRB*, 326 F.2d 466, 470 (9th Cir. 1966).

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(1) of the Act by discharging the following named nine El Paso-based drivers because they engaged in a strike,[55] and other protected concerted activity, as alleged in paragraphs 7(b), (c), (e), (j), and 9 of the complaint: Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez. Further, I find and conclude that the Respondent has violated Section 8(a)(3) and (1) of the Act by discharged the same nine drivers because they engaged in union activity, as alleged in paragraphs 7(c), (e), (l), and 10 of the complaint.

b. The discharge of the Nogales-based drivers

On September 24, 2004, the Respondent discharged its Nogales-based drivers Rogelio Delgadillo and Robert Ryburn. The General Counsel alleges that these employees were discharged because they engaged in union and other protected concerted activity, and were in fact the principal employees supporting the union organizing effort. On the other hand, the Respondent takes the position that it fired Delgadillo and Ryburn because they threatened to physically harm fellow Nogales-based drivers to prevent them from accepting assignments to drive the Respondent's trucks to and from the Silza facility in Juarez.

As this is a dual motivation question, the issue must be decided under the framework established by the Board in *Wright Line*, supra, and its progeny. As such, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to terminate the employees. Following the guidelines set forth in *Tracker Marine*, supra, I conclude that the General Counsel has made a prima facie showing that Ryburn's and Delgadillo's union and other protected concerted activity were a motivating factor in the Respondent's decision to terminate them.

Among the Nogales-based drivers, Ryburn and Delgadillo had been vocal in bringing to management's attention the various complaints, which had been of long standing. These were the same complaints that troubled the El Paso-based drivers, including salary and benefits, waiting time at the border, safety, and truck maintenance. Earlier in this decision, I discussed at length the specific instances where both Ryburn and Delgadillo, as well as other employees, articulated these complaints to various supervisors and agents of the Respondent, including Gardea and Velasco. These complaints were made with increasing frequency through the period from 2003 until approximately August 2004. However, the drivers remained dissatisfied with management's seeming disinterest in remedying their complaints. It was in that context that in mid-August 2004, 13 or 14 drivers, including Ryburn and Delgadillo, met at the "Exquisito" restaurant in Nogales. Among other matters, they discussed their unresolved complaints, and a decision was made to contact the Union to determine whether representation would be helpful. It was Ryburn who contacted union organizer Kathy Campbell to schedule an organizational meeting with the drivers.

[55] Based on the evidence of record, I conclude that the El Paso-based drivers were engaged in an "economic strike" on September 11 and 13, 2004. While engaged in that economic strike, they were unlawfully discharged on September 14.

From the inception of the organizing campaign, dispatcher Velasco indicated to the drivers his knowledge of their union activity. On numerous occasions, Velasco sought out Ryburn and Delgadillo to question them about the Union, the status of the campaign, and whether he could participate. Velasco testified that the reason he spoke specifically to Ryburn and Delgadillo was because he considered them "knowledgeable about the Union."

On August 30, 2004, Campbell met with the drivers, explained to them how the Union worked, and how it could help them with their complaints about their wages, hours, and working conditions. Ryburn and Delgadillo translated for the mainly Spanish-speaking drivers, and they assisted Campbell in distributing and collecting the union authorization cards. Following the meeting, Ryburn gave out several additional authorization cards, which were subsequently signed and given back to him.

The organizational campaign progressed, with the Union filing a representation petition on September 13, seeking to represent the Nogales-based drivers. Shortly after the work stoppage in El Paso, the Nogales drivers decided to "go public" with their organizing efforts. Campbell sent Ryburn union paraphernalia, such as union key chains, pens, bumper stickers, and pins, which Ryburn openly distributed at the Respondent's Nogales office to those drivers who expressed an interest. Dispatcher Velasco was present at the time, and even asked Ryburn for a union key chain. Ryburn consistently wore a union pin until he was terminated. Delgadillo placed a union bumper sticker on the dashboard of his personal vehicle, which he customarily parked in front of the Respondent's Nogales office.

Based on the above, there is no doubt that Ryburn and Delgadillo were heavily involved in protected concerted activity with the other drivers by registering complaints with the Respondent's managers over wages, hours, and working conditions. It is equally clear that both men were actively engaged in the union organizational campaign, and were among the most open union supporters. The Respondent's knowledge of Ryburn's and Delgadillo's protected activities is really not in dispute. Management was aware of their complaints over a long period of time, and dispatcher Velasco acknowledged that he sought them out with questions about the Union. Further, their subsequent discharges on September 24 were, of course, an adverse employment action.[56] Therefore, the only question that remains in order for the General Counsel to establish a prima facie case is whether there exists a link or nexus between Ryburn's and Delgadillo's protected activity and their terminations by the Respondent.

I am of the view that there is especially strong evidence of a connection between the protected activity of Ryburn and Delgadillo and their terminations. As I have said before, the Respondent was engaged in a coordinated and deliberate effort to frustrate both its Nogales-based and El Paso-based drivers in the exercise of their Section 7 rights. Animus directed toward employees exercising union and other protected concerted activities is amply demonstrated by the numerous unfair labor practices committed by the Respondent's supervisors and agents. As I have already found, these unfair labor practices included Velasco interrogating employees, creating an impression of surveillance, and threatening employees with reprisals; Gardea threatening employees with reprisals; Meraz soliciting employees to resign their employment, threatening employees with discharge, promising a wage increase, and threatening the loss of a wage increase; Acosta threatening employees with discharge; and Espinoza promising a wage increase, all in order to discourage employees from engaging in protected activity. This conduct, which I have found to violate Section 8(a)(1) of the Act, establishes animus and is a strong indication that the Respondent's termination of Ryburn and Delgadillo was directly related to their protected activity.

The General Counsel, having met the burden of establishing that the Respondent's actions were motivated, at least in part, by animus toward Ryburn's and Delgadillo's protected activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, supra; *Regal Recycling, Inc.*, supra. The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.*, supra. The Respondent has failed to meet this burden.

The Respondent contends that Ryburn and Delgadillo were terminated because they threatened other Nogales-based drivers with physical harm in an effort to dissuade them from driving to the Silza facility in Juarez. As has been discussed at length, the El Paso-based drivers were engaged in a work stoppage on September 11 and 13. In an attempt to keep delivering its product to the Silza facility in Juarez, Oscar Gardea directed dispatcher Velasco to find Nogales-based drivers who were willing to make deliveries to Juarez, which was not their usual route. Ultimately, Velasco asked most of the Nogales drivers to deliver propane to Juarez. However, the drivers were reluctant to do so. For some, there was an interest in demonstrating solidarity with the El Paso-based drivers. For others, there was a fear that if they drove to Juarez, the El Paso drivers might seek to harm them for undermining the strike. Even following Velasco's threat to discharge drivers who refused the assignment, the Nogales-based drivers were still reluctant to make the trips.

Gardea testified that he learned from Nogales-based drivers Jorge Curiel and Luis Davila that Ryburn had threatened them, and from Nogales-based driver Jesus Valenzuela that Delgadillo had threatened him. When pressed by counsel for the General Counsel, Gardea admitted that Davila[57] told him he had heard "rumors," but that he himself had never been threatened by Ryburn. Further, when Curiel testified, he indicated that he had merely told Gardea that Ryburn had said that drivers who went to El Paso would get "fucked up." Regarding Delgadillo's alleged threat to Valenzuela, Valenzuela testified that Delgadillo explained to him that the El Paso drivers were striking and that if the Nogales drivers took the Juarez routes, then the El Paso drivers would not get what they wanted. Also, Valenzuela testified that Delgadillo told him that if he went to

[56] It should be noted that the actual discharges of Ryburn and Delgadillo by Gardea on September 24, occurred at the Respondent's facility in Nogales, Arizona, and not in Mexico.

[57] Davila did no testify at the hearing.

Juarez that "would not be the end of it." However, Valenzuela made it clear that he did not feel threatened by Delgadillo's comment.

Ryburn and Delgadillo credibly testified that they did not threaten any Nogales driver with physical harm for driving to Juarez. A number of Nogales-based drivers supported that testimony, and indicated that they had heard no such threats. It is clear that the drivers were concerned about, and did discuss among themselves, the possibility that if they drove to Juarez that the El Paso-based drivers, or their friends, might seek retribution. However, that is far from constituting a threat by either Ryburn or Delgadillo to cause physical harm. The comments that Nogales-based drivers in Juarez might get "fucked up," or that there could be consequences for driving to Juarez, as in "would not be the end of it," were merely expressions of the very real possibility that the El Paso-based drivers would not look kindly upon the Nogales drivers taking their routes.

The evidence shows that Gardea was much too quick to grasp on any alleged reason to fire Ryburn and Delgadillo. He did not conduct a credible investigation to determine whether the two drivers had actually made any threats of violence, never having contacted either man. In fact, the first time that Gardea heard them deny making any threats of violence was when he handed Ryburn and Delgadillo their letters of termination on September 24. (GC Exhs. 3 and 4.)

In my opinion, the Respondent's stated reason for terminating Ryburn and Delgadillo was clearly pretextual. The Respondent certainly can not claim to have a "zero tolerance" policy toward workplace violence that would justify terminating the two drivers. To the contrary, as counsel for the General Counsel points out in her posthearing brief, there are several instances of actual acts of violence far more serious than mere threats, from which no terminations resulted. The evidence is undisputed that both drivers Valenzuela and Curiel assaulted coworkers, and yet neither man was terminated for the incident. Employers are not free to apply a double standard to union adherents, ignoring behavior by employees who refrain from union activities that is at least as serious, or more serious than, the misconduct of the union supporters. *Overnite Transportation Co.*, 343 NLRB No. 134, slip op. at 11 (2004); See *Aztec Bus Lines Inc.*, 289 NLRB 1021, 1024 (1988); *Champ Corp*., 291 NLRB 803, 806 (1988).

It is important to place the terminations of Ryburn and Delgadillo in context. They occurred some 10 or 11 days after both the filing of the representation petition for Nogales and the work stoppage in El Paso. The Respondent was faced with both ongoing and potential organizing efforts and significant protected concerted activity by its drivers in both El Paso and Nogales. The Respondent's managers reacted with a heavy hand. They were obviously in a panic to ensure that the union campaign in Nogales did not succeed, and that such a campaign did not commence in El Paso. In such a context, it is reasonable to conclude that as driver Sene credibly testified, dispatcher Velasco told him about 1 week after Ryburn and Delgadillo were fired that the men had been terminated because they were "troublemakers, instigators," and were "trying to form a union." Certainly, the timing of the two discharges constitutes additional evidence to support an inference of anti-union motivation. See *Sawyer of Napa Inc.*, 300 NLRB 131, 150 (1990).

I find the Respondent's stated explanation for terminating Ryburn and Delgadillo to constitute a pretext. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case by any standard of evidence. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because Ryburn and Delgadillo engaged in union and other protected concerted activities.[58] *Williams Contracting, Inc.*, supra; *Limestone Apparel Corp*., supra; *Shattuck Denn Mining Corp v. NLRB*, supra.

Accordingly, I find and conclude that the Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Rogelio Delgadillo and Robert Ryburn on September 24, 2004, because of their union activity, as alleged in complaint paragraphs 7(f), (g), and 10. Further, I find and conclude that by discharging Delgadillo and Ryburn because they engaged in other protected concerted activity, the Respondent has committed an independent violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 7(f), (g), and 9.

c. The negative references about Ryburn and Delgadillo

It is alleged in complaint paragraphs 7(h) and (i) that on about October 9, 2004, the Respondent gave negative employment references about Ryburn and Delgadillo to Coastal Transport, a prospective employer of theirs, which subsequently refused to hire them. The General Counsel alleges that this conduct was engaged in by the Respondent, through Gardea, because of Ryburn's and Delgadillo's union and other protected concerted activity. Counsel for the Respondent contends that any comments Gardea made about Ryburn and Delgadillo to representatives of Coastal Transport (Coastal) were factual and unrelated to any protected activity engaged in by the two drivers.

The facts surrounding this allegation are really not in dispute. Following their terminations, Ryburn and Delgadillo considered applying for employment with Coastal, one of the Respondent's competitors. As set forth in detail earlier in this decision, Ryburn and Delgadillo called Wendy Thompson, a Coastal manager, and spoke with her about hiring them for the Nogales, Mexico to Gallup, New Mexico route. After hearing about their extensive experience, Thompson asked them to submit a job application. However, later Ryburn and Delgadillo realized that they might have a potential problem.

At the time Coastal did not have an office in Nogales, Arizona, but Coastal and the Respondent had an arrangement pur-

[58] As a sort of "after thought," the Respondent contends that, in any event, it would have fired Ryburn because of a comment that he made upon learning of his termination. Gardea informed Ryburn of his termination and told him that he (Gardea) was just the messenger, after which Ryburn commented that they "kill the messenger." Ryburn admitted making the comment, but credibly testified that he also said that it was "just a saying." Gardea appeared to have feigned concern. However, I am of the view that under the circumstances, it was not reasonable for either Gardea or Velasco to have taken the comment seriously. Therefore, I do not believe that it would serve as a legitimate independent basis to have terminated Ryburn, had he not already been fired.

suant to which Coastal drivers picked up customs' documents at the Respondent's office in Nogales, Arizona. Coastal drivers had no option but to stop at the Respondent's Nogales office for those documents, before attempting to cross the International border on their way to the Silza facility in Nogales, Mexico. Ryburn and Delgadillo were concerned that because of their discharges and Gardea's animosity toward them, Gardea might not want them at the Respondent's Nogales, Arizona office picking up customs' documents. They decided to call Thompson back and explain to her the specific circumstances of their discharges.

According to Ryburn, he and Delgadillo called Thompson back and began to explain their belief that they had been fired because of their union activity. However, she interrupted them to say that she had just spoken with Gardea, and he did not want them at the Respondent's Nogales office. Ryburn testified that he told Thompson that what Gardea was doing was a "pretty messed up thing," and that she agreed with his assessment. Thompson allegedly mentioned some other routes that she could place the men on, but they told her that they were not interested in those routes. According to Ryburn, he and Delgadillo were not interested in those other routes because they paid less than the Nogales, Mexico, to Gallup route. Gardea's testimony on this matter was in substantial agreement with Ryburn's testimony. He testified that in response to Thompson's question of whether he had any problem with Coastal hiring Ryburn and Delgadillo, Gardea responded that he had no problem with the two men working for Coastal, but that he did not want them in the Respondent's office in Nogales and "did not want them near California Gas drivers." Neither Ryburn nor Delgadillo formally submitted an application to work for Coastal.

Gardea's own testimony establishes that he informed Thompson that he did not want Ryburn and Delgadillo at the Respondent's Nogales facility, even to briefly pick up customs' documents, or "near" the Respondent's employees. As I have already concluded that under the framework as established in *Wright Line*, supra, and *Tracker Marine*, supra, Gardea's conduct in discharging Ryburn and Delgadillo was violative of the Act, concomitantly, his actions in essentially "blacklisting" the two drivers was a continuation of that unlawful activity. Regardless of what explanation he gave Thompson for not wanting Ryburn and Delgadillo in contact with the Respondent's employees, Gardea's reasons obviously emanated from the two men's' union and other protected concerted activities. An employer may not, for the purpose of punishing an employee for exercising his Section 7 rights or engaging in union activities, seek to prevent another employer from hiring the employee. *Kaiser Steel Corp.*, 259 NLRB 643, 646 fn. 14 (1981) enf. denied on other grounds 700 F.2d 575, 576 (9th Cir. 1983); *Armstrong Rubber Co.*, 215 NLRB 620 fn. 1 (1974). In this case, the Respondent, through Gardea, did preciously that.

Based on Ryburn's credible and unrebutted testimony, Thompson was highly interested in considering the two drivers for Coastal's Nogales, Mexico, to Gallup route. However, Gardea's refusal to allow Ryburn and Delgadillo to use the Respondent's facility in Nogales effectively precluded Thompson from hiring them, as they were not interested in other routes Coastal had available. Therefore, Gardea's negative references violated the Act. Accordingly, I find and conclude that on about October 9, 2004, the Respondent gave negative employment references about Ryburn and Delgadillo to Coastal Transport, a prospective employer, which then refused to hire them. Clearly, such conduct by the Respondent would interfere with, restrain, and coerce its employees in the exercise of their Section 7 rights. Since this conduct was engaged in by the Respondent because of Ryburn's and Delgadillo's union and other protected concerted activities, the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 7(h), (i), and 9.

However, unlike the General Counsel, I do not believe that the above described conduct engaged in by the Respondent also constitutes an independent violation of Section 8(a)(3) of the Act. Obviously, Coastal is not a respondent in this proceeding. A negative reference will violate Section 8(a)(3) of the Act only where it can be established by a preponderance of the evidence that the prospective employer refused to hire the job applicant because of his protected activities. *James Group Services, Inc*., 219 NLRB 158, 163 (1975); *L. E. Schooley, Inc.*, 119 NLRB 1212, 1213 (1958). In this case, the evidence is insufficient to establish that Coastal's action was based on its knowledge of Ryburn's and Delgadillo's protected activity, as opposed simply to its being informed by the Respondent that the two drivers could not use the Respondent's facility in Nogales.[59] Accordingly, I shall recommend that complaint paragraph 7(i) be dismissed, but only to the extent that it alleges an independent violation of Section 8(a)(3) of the Act.[60]

3. The appropriateness of a bargaining order

The General Counsel argues that the Respondent's unlawful conduct here was so egregious and pervasive that it created a coercive atmosphere rendering impossible the holding of a fair representation election. Counsel for the General Counsel asserts that the only appropriate remedy given the severity of the Respondent's conduct is the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In *Gissel*, supra, the seminal case on remedial bargaining orders, the United States Supreme Court held:

> (1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.
>
> (2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices (category one cases).
>
> (3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring

[59] Thompson's apparent interest in hiring Delgadillo and Ryburn for Coastal's other routes make it seem unlikely that the men's union activity motivated Thompson's decision not to offer them the Nogales, Mexico, to Gallup route.

[60] The reference to par. 7(i) in complaint par. 10 shall also be dismissed.

a fair election through traditional remedies is "slight," a bargaining order may issue (category two cases).

Under the circumstances of this case, I find that a bargaining order is the only appropriate remedy for the unfair labor practices committed by the Respondent. The Respondent's conduct falls into at least the second category of cases as referenced above. As I have repeatedly noted, I found the Respondent's numerous unfair labor practices to constitute a coordinated and deliberate attempt to frustrate the Section 7 activities of its employees in both El Paso and Nogales. Further, I have found that as of August 30, 2004, the Union represented a majority of the employees in the Nogales bargaining unit when it obtained valid signed authorization cards from 15 of the 19 drivers in the bargaining unit.

I must emphasize that the evidence establishes that the Respondent's supervisors, agents, and managers were determined to prevent its Nogales-based drivers from successfully organizing on behalf of the Union, while at the same time aggressively retaliating against the striking El Paso-based employees who had also indicated an interest in the Union. These unfair labor practices including interrogation, the impression of surveillance, threats of unspecified reprisals, soliciting employees to resign, threats of discharge, promise of benefit, and loss of a wage increase, all related to the union and other protected concerted activities of the Respondent's employees.

Additionally, the Respondent discharged 11 employees because they engaged in protected activity. Nine El Paso-based drivers were fired because they engaged in a work stoppage and had indicated an interest in soliciting the support of the Union. Shortly thereafter, the Respondent fired two Nogales-based drivers, who were leaders in both the organizing campaign on behalf of the Union, as well as active participants in the concerted effort to have the drivers' complaints remedied. Such discharges involve "hallmark" violations of the Act. As counsel for the General Counsel points out in her brief, these discharges—including Meraz' "showdown" with the El Paso-based strikers, and Gardea's termination of the two leaders of the organizing effort in Nogales—demonstrate that the Respondent's actions were designed to signal the other employees that the Respondent would not tolerate such concerted activities. See *Garvey Marine, Inc*., 328 NLRB 991, 994 (1999) ("public and dramatic discharge" of discriminatees). In El Paso, all the strikers, nine in number, were told that they were fired for refusing to return to work. In Nogales, the two most active union supporters were fired for reasons that were transparently pretextual. Where such hallmark violations exist, a bargaining order is an appropriate remedy to cleanse the long-term coercive effect. *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Allied General Services, Inc.*, 329 NLRB 568 (1999).

Further, almost all the Respondent's supervisors and agents in El Paso/Juarez and Nogales, Arizona/ Nogales, Mexico, were involved in the commission of the unfair labor practices. However, the actual discharges were conducted by the Respondent's highest ranking officials. Operations manager Gardea fired Ryburn and Delgadillo in Nogales, while accounting manager Meraz fired the nine strikers in El Paso. The Board has noted that such unfair labor practices are magnified if the conduct is perpetrated by high ranking officials. See *Waste Management of Utah, Inc.*, 310 NLRB 883, 907 (1993); *Q-1 Motor Express, Inc.*, 308 NLRB 1267, 1268 (1992); *Weldun International, Inc.*, 321 NLRB 733, 736 (1996).

The record establishes that as of August 2004, the Respondent employed approximately 19 drivers in Nogales and approximately 14 drivers in El Paso.[61] Of this number, nine El Paso drivers were fired along with two Nogales drivers. The total of 11 dischargees was approximately one-third of the drivers employed at these two locations. Although this was certainly a large portion of the work force, even more significant was the prominent nature of the terminated employees. The nine employees fired in El Paso constituted all the strikers, while the two fired in Nogales were the most active union supporters. The message these discharges sent to the remaining employees was the message intended, which was that engaging in union and other concerted activity was likely to lead to discharge. The Respondent's conduct would naturally have a pervasive and lasting impact. Such an impact is obvious considering the results of the representation election held on October 18, 2004. Despite having an overwhelming showing of support in the Nogales unit through authorization cards on August 30, the Union lost the election by a vote of 8 to 4, with 3 challenged ballots. Of course, between the Union's showing of majority support at the end of August and the election, the Respondent discharged 11 employees at the two locations.

Based on this conduct, I find it highly unlikely that the Respondents' employees would be willing or freely able to express their choice in an election. I am of the view that the Respondent's actions preclude the conduct of a fair rerun election. See *Garvey Marine Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Overnight Transportation Co.*, 329 NLRB 990 (1999).

The Respondent's unfair labor practices are so serious, that traditional remedies such as offers of reinstatement and the posting of a notice are insufficient to remedy the violations and to guarantee a fair election. See *Adam Wholesalers, Inc.*, 322 NLRB 313 (1996). I believe that the Respondents' pervasive conduct constituted an "all out assault" on the employees' Section 7 rights at the El Paso and Nogales locations. Accordingly, I find that the Nogales-based employees' desires for union representation, as demonstrated by the union authorization cards, would be better protected by a bargaining order than by traditional remedies. I conclude that a bargaining order remedy is appropriate and warranted. *Camvac International, Inc.*, 288 NLRB 816, 822 (1988). As the Union's majority status was achieved on August 30, 2004, in the Nogales-based bargaining unit, the Respondent's bargaining obligation is deemed to have begun on that date. See *United Scrap Metal, Inc.*, 344 NLRB No. 55 (2005). Concomitantly, I shall recommend that the election be set aside because the Respondent's actions inter-

[61] In August 2004, the Respondent employed approximately 10 drivers in the San Diego, California area. This location was not directly involved in these proceedings.

fered with the conduct of the election. *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977).[62]

4. The alleged 8(a)(5) conduct

It is alleged in complaint paragraphs 8(b), (c), and (d) that since August 30, 2004, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Nogales-based unit by bypassing the Union and changing the routes normally driven by the Nogales drivers. It is further alleged that on September 24, 2004, the Respondent engaged in direct dealing with its employees by requesting that the Nogales-based employees drive the routes previously driven by striking or discharged El Paso-based drivers.

Counsel for the Respondent argues in his posthearing brief that there was no request made by the Respondent in September 2004 to its Nogales-based employees to drive the El Paso-based drivers' routes. According to counsel, any such request was made in mid-August, prior to the August 30 signing of union authorization cards.

Preliminarily, it should be noted that the dates relied on by both the General Counsel and the Respondent are incorrect. The credible testimony of employee witness and the logical sequence of events clearly demonstrates that the Respondent's dispatcher in Nogales, Gabriel Velasco, solicited Nogales-based employees to drive the El Paso routes on or about September 11 and 13, 2004. These were the dates of the strike in El Paso, and, obviously, the dates during which the Respondent's product was not reaching the Silza facility in Juarez. Both company owner Ernesto Flores and Gardea testified about the urgent need to service the Respondent's only primary customer, Universal, and to continue to deliver propane gas to the Silza facility. Meraz told the strikers that time was essential, and that the Respondent could not go without delivering product to Silza for even 1 more day. Gardea pressured Velasco to find Nogales drivers to take the routes to Juarez. Therefore, I have no doubt that the dates when Nogales-based drivers were asked to drive to Juarez corresponded with the dates of the strike. These dates were some 12 to 14 days after August 30, when the Union established majority support from the Nogales drivers through authorization cards.

While Velasco could not remember the dates of the strike in El Paso, he testified that it was at that time that Gardea asked him to send Nogales-based drivers and trucks to deliver product to Juarez. He admitted asking most of the Nogales drivers to volunteer, but "no one stepped forward." However, a number of drivers, including Hector Lopez, credibly testified that not only did Velasco ask for "volunteers," but, in fact, he told some of the drivers that if they continued to refuse the assignment to Juarez, they would be fired.

While the Respondent takes the position that it was not unusual for the Nogales drivers to be assigned routes to the Silza facility in Juarez, virtually every Nogales-based driver and former driver who testified at the hearing indicated that prior to the dates of the strike by the El Paso drivers, the Nogales drivers had never before been asked to drive to Juarez. The weight of the credible evidence strongly supports the drivers' testimony. It was only logical, as the Respondent had separate complements of drivers to service its respective routes to the Silza facilities in Juarez and Nogales, Mexico.

Accordingly, I conclude that the Nogales-based drivers were requested, and in some cases ordered, by the Respondent to drive the routes to Juarez on or about September 11 and 13, 2004.[63] Further, I conclude that this was the first time the Nogales-based drivers had been asked to drive these particular routes. This assignment to drive the Juarez routes was made after the Union had established its majority status on August 30 by means of authorization cards.

As I have already ruled above, the Respondent's bargaining obligation commenced on August 30, the date the employees in the Nogales-based bargaining unit expressed majority support for the Union. *United Scrap Metal Inc.*, supra. Thereafter, Velasco attempted to alter the Nogales-based drivers' route assignments by directly dealing with them. Of course, these route assignments were inherently related to their rates of pay, hours, and terms and conditions of employment. These are mandatory subjects over which the Respondent was required to bargain with the Union. See *Permanente Medical Group, Inc.*, 332 NLRB 1143 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995). In attempting to make these changes in the route assignments without consulting and bargaining with the Union, the Respondent was engaged in direct dealing with the represented employees and was making unilateral changes in the terms and conditions of their employment in violation of the Act. *Christopher Street Owners Corp.*, 294 NLRB 277, 282 (1989).

Accordingly, I find and conclude that since on or about September 11 and 13, 2004, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the Nogales-based unit by bypassing the Union and dealing directly with the Nogales-based drivers, and unilaterally changing the routes previously driven by them. Such conduct constitutes a violation of Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraphs 8(b), (c), and (d), and 11.

By the Respondent's own admission, Ryburn and Delgadillo were terminated for "inciting the drivers into not complying" with the new routes, and for their opposition to the request by

[62] In his brief, counsel for the Respondent makes a cryptic reference to the doctrine of "unclean hands" and a "court of equity" in connection with the drivers allegedly stealing diesel fuel. I consider this argument to be totally without merit. The mission of the Agency is to administer and enforce the Act, and the Board's proceedings certainly do not constitute "courts of equity." Further, there is no evidence that the drivers stand before the Board with "unclean hands." I have made no finding that the drivers were involved in the theft of diesel fuel. To the contrary, I have concluded that the past practice of the drivers selling excess diesel was with the permission, and even encouragement, of the Respondent's mangers. It was part of their regular compensation, and did not constitute a misappropriation of the Respondent's property. When the policy changed to discontinue the practice, the drivers involved in this proceeding apparently stopped selling diesel.

[63] The complaint mistakenly places these events as occurring on September 24, 2004. However, even assuming the request to drive to Juarez was made on or about September 24, such dates obviously still followed the Union's showing of majority status on August 30.

Velasco that they drive to Juarez. See (GC Exhs. 3 and 4.) As such, their terminations for opposing the Respondent's unilateral changes also constitute a violation of Section 8(a)(5) of the Act. See *Aldworth Co.*, 338 NLRB 137, 147 fn. 48 (2002); *Great Western Produce, Inc.*, 299 NLRB 1004, 1005 (1990). Accordingly, I find and conclude that the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged in paragraphs 7(f), (g), 8(b), (c), and (d), and 11 of the complaint.

IV. THE REPRESENTATION CASE

By letter dated March 4, 2005, the Union withdrew all its objections to conduct affecting the results of the election in Case 28–RC–6316, with the exception of Objection 4, 5, and 6. (CP Exh. 1.) Objection numbers 4 and 5 relate, respectively, to the discharges of employees Robert Ryburn and Rogelio Delgadillo, and are coextensive with certain complaint allegations. These objections have merit. For the reasons stated above in detail, I have concluded that the Respondent terminated both Ryburn and Delgadillo in violation of Section 8(a)(1), (3), and (5) of the Act. Objection 6 alleges that in about September and October 2004, the Respondent threatened its employees with closure of the Nogales facility if the Union were selected as their collective-bargaining representative. At the hearing, the Union offered no independent evidence in support of this objection. While I have found that the Respondent committed widespread and numerous unfair labor practices, I have not found any evidence to support this specific objection. Therefore, I shall recommend that Objection 6 be overruled.

For the reasons that I previously set forth, the Respondent's actions interfered with the conduct of the election and, therefore, the election must be set aside. As I noted earlier in detail, I find that because of the Respondent's pervasive unfair labor practices, the employees' desires for union representation, as demonstrated by union authorization cards, would be better protected by a bargaining order than by a rerun election. Since the Union's majority status was achieved on August 30, 2004, the Respondent's bargaining obligation is deemed to have begun on that date. Accordingly, I shall recommend that the election be set aside, and the representation petition in Case 28–RC–6316 be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, California Gas Transport, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Creating an impression among its employees that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

(d) Threatening its employees with unspecified reprisals because they engaged in union and other concerted activities.

(e) Soliciting its employees to resign their employment with the Respondent because they engaged in union and other concerted activities.

(f) Threatening its employees with discharge because they engaged in union and other concerted activities.

(g) Promising its employees a wage increase if they did not select the Union as their collective-bargaining representative.

(h) Threatening its employees with loss of a wage increase if they selected the Union as their collective-bargaining representative.

(i) Giving negative employment references about its employees (Rogelio Delgadillo and Robert Ryburn) to a prospective employer (Coastal Transport) because they engaged in union and other protected concerted activities.

4. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Discharging its El Paso-based employees Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez.

(b) Discharging its Nogales-based employees Rogelio Delgadillo and Robert Ryburn.

5. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers employed by the Respondent at its Nogales, Arizona, facility located at 2651 Grand Avenue #19, Nogales, Arizona, excluding all other employees, dispatchers, office clerical employees, guards, and supervisors as defined in the Act.

6. On or about August 30, 2004, a majority of the employees in the unit described above designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent.

7. Since on or about September 11 and 13, 2004, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above by bypassing the Union and dealing directly with those employees, and unilaterally changing the routes previously driven by them. Also, the Respondent terminated Nogales-based employees Rogelio Delgadillo and Robert Ryburn because they opposed these unilateral changes. The Respondent has thereby violated Section 8(a)(5) and (1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its El Paso-based employees Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez, and its Nogales-based employees Rogelio Delgadillo and Robert Ryburn, my recommended order requires the Respondent to offer them immediate reinstatement to their former positions, displacing if necessary any replacements, or if their positions no longer exists, to substantially equivalent positions, without loss of seniority and other privileges. My recommended order further requires the Respondent to make the above named employees whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date the Respondent makes proper offers of reinstatement to them, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The recommended order further requires the Respondent to expunge from its records any reference to the discharges of the above named employees, and to provide them with written notice of such expunction, and inform them that the unlawful conduct will not be used as a basis for further personnel actions against them. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the removed material against these employees in any other way. As the Respondent has already given negative employment references about Robert Ryburn and Rogelio Delgadillo to a prospective employer of theirs (Coastal Transport), it shall contact that employer and withdraw any objection it gave to the employment of Ryburn and Delgadillo, and inform them in writing that it has done so.

Further, the recommended order shall require the Respondent, upon request, to recognize and bargain collectively with the Union, as the exclusive collective-bargaining representative of its Nogales-based drivers from August 30, 2004, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

I shall further recommend a broad order, as Respondent's egregious and widespread misconduct demonstrates a general disregard for employees' statutory rights. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Finally, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.[64]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondent, California Gas Transport, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Creating an impression among its employees that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

(d) Threatening its employees with unspecified reprisals because they engaged in union and other concerted activities.

(e) Soliciting its employees to resign their employment with the Respondent because they engaged in union and other concerted activities.

(f) Threatening its employees with discharge because they engaged in union and other concerted activities.

(g) Promising its employees a wage increase if they did not select the Union as their collective-bargaining representative.

(h) Threatening its employees with loss of a wage increase if they selected the Union as their collective-bargaining representative.

(i) Giving negative employment references about its employees to prospective employers of theirs because they engaged in union and other protected concerted activities.

(j) Bypassing the Union and dealing directly with its Nogales-based employees in the collective-bargaining unit represented by the Union regarding those employees' wages, hours, and other terms and conditions of employment.

(k) Discharging or otherwise discriminating against any of its employees because they engaged in union activities or other protected concerted activities, including their participation in a strike.

(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nogales-based employees Rogelio Delgadillo, and Robert Ryburn, and El Paso-based employees Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez full reinstatement to their former positions or, if any such position no longer exists, to a substantially equivalent

[64] Specifically, the Respondent shall be required to post notices in English and Spanish at its facilities in El Paso, Texas, and Nogales, Arizona. As the employees based in the San Diego, California area were not directly involved in this proceeding, I will not grant counsel for the General Counsel's request to require notice posting in San Diego. However, I will also require the Respondent to mail notices to the homes of those current employees and former employees based in either El Paso or Nogales, Arizona, and employed by the Respondent at any time since August 30, 2004. Notice mailing is necessary as the testimony of various witnesses indicated that the drivers often do not go to the Respondent's respective facilities in El Paso or Nogales for long periods of time. Obviously, notice posting will not be ordered at the Silza facilities as, among other reasons, I have no authority to order such posting in Mexico, a sovereign, independent country.

[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

position, dismissing if necessary any employee hired to fill any such position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision;

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez, and inform each of them in writing that this has been done, and that their unlawful discharges will not be used against them as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

(d) Within 14 days from the date of this Order, contact Coastal Transportation, retract any negative references given to Coastal about prospective employees Rogelio Delgadillo and Robert Ryburn, indicate that the Respondent has no objection to the employment of these prospective employees by Coastal on any of its routes, and inform Delgadillo and Ryburn in writing that this has been done.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(f) On request, recognize and bargain with General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative from August 30, 2004, with respect to the drivers employed in the Nogales-based bargaining unit, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(g) Within 14 days after service by the Region, post at its facilities in El Paso, Texas, and Nogales, Arizona, copies of the attached notice marked "Appendix"[66] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 14 days after service by the Region, duplicate and mail copies of the attached notice marked "Appendix" in both English and Spanish, at its own expense, to all current and former Nogales-based and El Paso-based employees who were employed by the Respondent at any time since August 30, 2004. Copies of the notice signed by the Respondent's authorized representative shall be mailed to the last known address of each of the employees.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at San Francisco, California, on September 16, 2005.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for, or activities on behalf of, the General Teamsters (Excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters, AFL–CIO (the Union), or any other union.

WE WILL NOT make it appear to you that we are watching your union or other concerted activities.

WE WILL NOT threaten you for supporting the Union as your collective-bargaining representative.

WE WILL NOT threaten you for engaging in union or other concerted activities.

WE WILL NOT encourage you to resign your job because you engage in a strike against us.

WE WILL NOT threaten to fire you because you engage in a strike against us.

WE WILL NOT promise to give you a wage increase if you do not select the Union as your collective-bargaining representative.

[66] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with the loss of a wage increase if you select the Union as your collective-bargaining representative.

WE WILL NOT give negative references about you to prospective employers because you were a supporter of the Union, or because you engaged in union or other concerted activities.

WE WILL NOT change or request that you change your normal driving routes without first providing notice to the Union and allowing the Union an opportunity to bargain with us regarding those Nogales-based employees who are represented by the Union.

WE WILL NOT discharge or otherwise discipline you because you are a supporter of the Union, engage in union activity, engage in a strike, or engage in other concerted activity with coworkers concerning your wages, hours, and working conditions.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, offer Nogales-based employees Rogelio Delgadillo and Robert Ryburn and El Paso-based employees Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from out files any and all reference to the unlawful discharge of employees Rogelio Delgadillo, Robert Ryburn, Gonzalo Munoz, Efren Munoz, Alonso Alonso, Ramon Hernandez, Lorenzo Medina, Raul Almaraz, Jose Raul Almaraz, Rosario Gastelum, and Jacinto Hernandez, and notify them in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against them, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

WE WILL, within 14 days from the date of the Board's Order, contact Coastal Transportation and retract any negative references given to Coastal about prospective employees Rogelio Delgadillo and Robert Ryburn, indicate that we have no objection to the employment of these prospective employees by Coastal on any of its routes, and inform Delgadillo and Ryburn in writing that this has been done.

WE WILL, upon request, recognize and bargain collectively with General Teamsters (Excluding Mailers), State of Arizona, Local 104, and affiliate of the International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative, from August 30, 2004, with respective to the drivers employed in the Nogales-based bargaining unit, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

CALIFORNIA GAS TRANSPORT, INC.